

# NOTES

## STATE STATUTES DEPRIVING STATE COURTS OF JURISDICTION AS AFFECTED BY THE RULE OF ERIE V. TOMPKINS\*

The doctrine of *Erie Railroad v. Tompkins*<sup>1</sup> has by now been extended so that such matters as burden of proof,<sup>2</sup> conflict of laws rules,<sup>3</sup> and statutes of limitations<sup>4</sup> are "substantive"<sup>5</sup> law binding the federal courts to follow state rules in diversity cases. Recently, in *Angel v. Bullington*,<sup>6</sup> the Supreme Court made a further extension of the *Erie* rule: a state statute which denies to all state courts jurisdiction over a particular cause of action is "substantive" and, if constitutional, will preclude the federal courts sitting in that state from exercising jurisdiction. The case also presents an application of the doctrine of res judicata which, combined with the *Erie* rule, led to two dissenting opinions.<sup>7</sup>

The case arose out of an attempt by Bullington, a Virginia resident, to collect from Angel, a North Carolina resident, the balance of the purchase price of Virginia land sold to Angel in 1940 and covered by a series of notes secured by a deed of trust. Upon default in one of the notes, Bullington, acting upon an acceleration clause in the deed, caused the trustees to sell the land. The proceeds of the sale being insufficient to pay off the notes, Bullington brought suit in a North Carolina state court to collect the deficiency.<sup>8</sup> Although a judgment was awarded to Bullington in the trial court, the Su-

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\* *Angel v. Bullington*, 67 Sup. Ct. 657 (1947). The opinion of the circuit court of appeals, 150 F.2d 679 (C.C.A. 4th 1945) has been noted in 21 IND. L. J. 228, 24 N.C.L. REV. 267, and 13 U. OF CHI. L. REV. 195 (1946).

1. 304 U.S. 64 (1938).

2. *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208 (1939); *Palmer v. Hoffman*, 318 U.S. 109 (1943).

3. *Griffin v. McCoach*, 313 U.S. 498 (1941); *Klaxon Co. v. Stentor Co.*, 313 U.S. 487 (1941).

4. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), established the rule as to equity cases; it has long been held that state statutes of limitations bind the federal courts in cases at law. 1 MOORE'S FED. PRACTICE 240-5 (1938).

5. For an excellent discussion of the general problem of "substance" v. "procedure" as well as the problem under the *Erie* doctrine, see COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS c. VI (1942).

6. 67 Sup. Ct. 657 (1947).

7. Mr. Justice Reed and Mr. Justice Rutledge wrote dissenting opinions, in each of which Mr. Justice Jackson joined.

8. The land was sold at a total price of \$11,000, which included an agreement by Angel to assume payment of an F.H.A. loan amounting to \$7,400. Angel paid \$500 of the total amount due before defaulting. At the trustee sale, which occurred three months after the original transaction, Bullington purchased the land for \$25, plus, of course, the obligation to repay the F.H.A. loan. In his suit, he sought a deficiency judgment of \$3,100.

preme Court of North Carolina ordered the action dismissed,<sup>9</sup> basing its decision on a 1933 North Carolina statute which provides that "in all sales of real property . . . [the holder of notes secured by a deed of trust] shall not be entitled to a deficiency judgment. . . ."<sup>10</sup> The court rejected Bullington's claim that the statute violated the United States Constitution,<sup>11</sup> stating that the statute, operating only to limit the jurisdiction of the state courts, was related solely to the "adjective law of the State" and thus did not violate the "substantive" provisions of the Constitution.<sup>12</sup>

Bullington did not appeal the decision to the United States Supreme Court<sup>13</sup> but began a new suit for the deficiency in a North Carolina federal district court. That court gave judgment for Bullington, and its decision was affirmed by the Court of Appeals for the Fourth Circuit.<sup>14</sup> The Supreme Court, however, by a six to three vote, reversed the judgment.

The ambiguity of Mr. Justice Frankfurter's majority opinion gives rise to alternative explanations of the holding. Perhaps the simpler theory is that the Court has formulated a new federal doctrine of *res judicata*, *i.e.*, if a court dismisses a cause of action because of a lack of jurisdiction, the whole cause of action becomes *res judicata*<sup>15</sup>—a radical revision of the present rule that only matters actually decided are *res judicata* in judgments not upon the merits.<sup>16</sup> This hypothesis seems highly questionable, for its logical implications seem too broad for the Court to accept.<sup>17</sup> Furthermore, it is doubtful

9. Bullington v. Angel, 220 N.C. 18, 16 S.E.2d 411 (1941).

10. N.C. GEN. STAT. § 45-36 (1943).

11. It is not clear upon what doctrines Bullington relied; the only one specifically mentioned in the North Carolina court's opinion is the full faith and credit clause. U.S. CONST. Art. IV, § 1.

12. 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941). The court also rejected Bullington's contention that the statute was not meant to include claims arising on land located outside of North Carolina. *Id.* at 21, 16 S.E.2d at 413. While this interpretation of the statute is questionable [See 13 U. OF CHI. L. REV. 196, 197-8 (1946)] apparently no attempt was made to raise the issue in the federal court proceedings. Any such attempt would have failed, in view of the doctrine that, in applying the *Erie* rule, federal courts are bound by an interpretation of a state statute made by the courts of that state. *Moore v. Illinois Central R. R.*, 312 U.S. 630 (1941); *cf.* *Corbin, The Laws of the Several States*, 50 YALE L.J. 762 (1941).

13. Bullington could have brought his case to the Supreme Court, not merely on certiorari, but as a matter of right, under § 237(a) of the Judicial Code, which provides that a state court judgment upholding the validity of a state statute under the Federal Constitution may be appealed to the Supreme Court. 43 STAT. 937 (1925), as amended, 45 STAT. 54 (1928), 28 U.S.C. § 344(a) (1940).

14. 56 F. Supp. 372 (W.D.N.C. 1944); 150 F.2d 679 (C.C.A. 4th 1945).

15. There is language in Mr. Justice Rutledge's dissenting opinion which indicates a belief that the majority may have been basing its decision upon this theory. 67 Sup. Ct. 657 at 669.

16. *Smith v. McNeal*, 109 U.S. 426 (1883); *Walden v. Bodley*, 14 Pet. 156 (U.S. 1840); RESTATEMENT, JUDGMENTS § 49 (1942).

17. If, for example, a party erroneously attacked National Labor Relations Board action in a federal district court, it seems most unlikely that the resultant dismissal of the

that the Court would have repudiated the traditional rule of *res judicata* without a discussion of the necessity for so doing, and without referring to any of the Supreme Court cases<sup>18</sup> which had helped to establish the doctrine.

The more plausible explanation is one which combines both more traditional *res judicata* and the *Erie* doctrine. A federal court, in diversity cases, follows state rules of "substantive" law. A state statute denying jurisdiction over a cause of action to all state courts expresses a state policy against the prosecution of such causes of action; since failure to give effect to the statute entails a "substantially different result," the statute is, therefore, "substantive" under *Erie*,<sup>19</sup> provided it is constitutional.<sup>20</sup> The constitutionality of the statute having been argued and decided in the North Carolina court, that issue is *res judicata*, and cannot be raised anew in a collateral proceeding.

If it be assumed that the decision was based upon this last theory, there seems little quarrel with the extension of the *Erie* rule.<sup>21</sup> The Court justifiably disregarded the North Carolina court's "procedural" characterization, for a state's characterization is made for different purposes from those which govern the application of the *Erie* doctrine.<sup>22</sup> And the latter's aims are here fulfilled because a statute banning deficiency judgments seems obviously to reflect a state policy in behalf of debtors. The decision does require a change in the rule of *David Lupton's Sons Co. v. Automobile Club of America*,<sup>23</sup>

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suit for want of jurisdiction would preclude a second suit in the proper forum, a circuit court of appeals. 49 STAT. 455 (1935), as amended, 29 U. S. C. § 160(e) and *cf. Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1934). Likewise, if an OPA regulation or order were erroneously challenged in a federal district court, it seems very doubtful that dismissal of the suit for lack of jurisdiction would prevent a second suit in the proper court, the Emergency Court of Appeals. 56 STAT. 33 (1942), as amended, 50 U.S.C. APP. § 924 (d) (Supp. 1946) and *see Lockerty v. Phillips*, 319 U.S. 182 (1943).

18. See note 16 *supra*.

19. *Griffin v. McCoach*, 313 U.S. 498 (1941), made explicit only the test that the state rule express a state policy while *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), made explicit only the "substantially different result" test. Each case, however, rested on an implicit assumption of the existence of both criteria.

20. *Klaxon Co. v. Stentor Co.*, 313 U.S. 487 (1941); *cf. Griffin v. McCoach*, 313 U.S. 498 (1941).

21. It should be noted that if the case had involved matters arising under a federal statute, it might have been unnecessary to follow the state statute. See Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267, 280-5 (1946).

22. The *Erie* policy is "so important to our federalism [that it] must be kept free from entanglements with analytical or terminological niceties." *Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945). See also COOK, *op. cit. supra* note 5, at 158-70.

23. 225 U.S. 489 (1912) (state statute depriving foreign corporations doing business in state of privilege of access to state courts when they fail to comply with certain statutory requirements does not deprive such corporation of access to federal court). The doctrine has often been applied in the lower federal courts. *E.g.*, *General Industries Co. v. 20 Wacker Drive Bldg. Corp.*, 156 F.2d 474 (C.C.A. 7th 1946); *McLean v. York Oil Field Supply Co.*, 138 F.2d 804 (C.C.A. 5th 1943); *Metropolitan Life Ins. Co. v. Kane*, 117 F.2d

which held federal jurisdiction to be unaffected by state statutes closing all state courts to certain types of proceedings. But, although termed "obsolete"<sup>24</sup> by the majority opinion, the *Lupton* doctrine seems only modified, for it is doubtful that all such statutes would be held "substantive" under the *Erie* rule.<sup>25</sup> Moreover, the *Lupton* rationale that federal jurisdiction can be affected only by Congressional enactment remains intact, since a federal court applying the *Erie* rule is acting pursuant to a federal statute, the Rules of Decision Act.<sup>26</sup> In this respect, therefore, only the effect of the *Lupton*

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398 (C.C.A. 7th 1941); *RFC v. Barnett*, 118 F.2d 190 (C.C.A. 7th 1941). *But cf.* *Diamond Glue Co. v. U.S. Glue Co.*, 187 U.S. 611 (1903).

24. 67 Sup. Ct. 657 at 662.

25. The crucial question in applying *Erie* to such a statute should be the determination of its purpose. For example, if such a statute were passed merely to clear crowded dockets, it would seem anomalous to apply the *Erie* doctrine, and thus give more protection to residents and non-residents "doing business" in the state than the state legislature intended. Such a statute also partakes of the character of the forum non conveniens doctrine and therefore should not be subject to *Erie*. See pp. 1045-6 *infra*. The decision in *Stephenson v. Grand Trunk Western R.R.*, 110 F.2d 401 (C.C.A. 7th 1940), *cert. granted*, 310 U.S. 623 (1940), *dismissed by agreement of the parties*, 311 U.S. 720 (1940) may be rationalized on either of these bases; but see Note, 35 ILL. L. REV. 351, 354 (1940). The same rationale will justify a decision like *Wofford v. Prudential Ins. Co.*, 65 F. Supp. 637 (W.D.S.C. 1946); *cf.* *Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898).

26. "The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." REV. STAT. § 721 (1875), 28 U.S.C. § 725 (1940). It should be noted that if the North Carolina court had characterized the statute as one which abolished the cause of action, there would have been no need for the federal court to consider the applicability of the *Erie* doctrine. Long before the *Erie* case it had been settled that the act required federal courts to apply state statutes affecting "substantive" rights (1 MOORE'S FED. PRACTICE 80-5 (1938)) but not statutes which affected "jurisdiction" (the *Lupton* rule) or "equitable remedial rights." See p. 1047 *infra*. The precise holding of the *Erie* case was that state rules of common law were also rules of decision for the federal courts but its effect has been to strengthen the traditional doctrine that state statutes affecting "substantive" rights must be applied by the federal courts. (See 1 MOORE'S FED. PRACTICE 56 (1946 Supp.)).

The instant case, in extending that rule to include certain "jurisdictional" statutes, represents an example of the renewed force given to the rule by the *Erie* decision. State statutes affecting "equitable remedial rights" may or may not be followed by the federal courts. See pp. 1047-8 *infra*. It should also be noted that, except where a failure to do so might produce a "substantially different result," the federal courts will follow the Federal Rules of Civil Procedure. See Clark, *supra* note 21 at 288-90, and cases cited in note 27 *infra*.

It is also possible on another ground that the decision represents but a modification of the *Lupton* rule. Since the Rules of Decision Act was not intended to affect the jurisdiction of federal courts, but only the rules of law which they apply, it would be more consistent with the Act to contend that the effect of the North Carolina statute was to abolish the cause of action in the North Carolina federal court, and not that the statute precluded the federal court from taking jurisdiction. This conceptual distinction, however, apparently was not made by the Court, since the majority opinion speaks only in terms of jurisdiction.

rule has been changed,<sup>27</sup> owing to the new interpretation of the Rules of Decision Act established by the *Erie* case.<sup>28</sup>

With the Court's use of *res judicata*, however, trouble arises.

Admittedly, the decision can be justified by traditional *res judicata* doctrine. The usual rule is that a judgment not "upon the merits" of a cause of action is nevertheless conclusive as to any matters actually decided.<sup>29</sup> Although not "upon the merits" as commonly interpreted,<sup>30</sup> the decision of the North Carolina court may be regarded as having specifically held that the statute was constitutional.<sup>31</sup> And even if the decision be viewed as not having included a specific finding of constitutionality,<sup>32</sup> it would have been logically necessary for the North Carolina court to decide the constitutional issue raised by *Bullington* before applying the statute to the case. To regard as *res judicata* matters litigated and necessarily decided is to make but a slight extension, if any, of the usual rule.<sup>33</sup>

27. It would also appear that the precise holding of the *Lupton* case has been changed by the *Bullington* decision, despite *FED. R. CIV. P. 17 (b)*, which provides that "the capacity of a corporation to sue . . . [in a federal court] shall be determined by the law under which it was organized." But cf. *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438 (1946) [*FED. R. CIV. P. 4 (f)*]; *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (*FED. R. CIV. P. 35 and 37*).

28. The *Bullington* decision may be open to criticism on the ground that, by preventing uniformity among federal courts, it will hinder the development of uniformity in all courts in the United States, state and federal. But, achieving such nation-wide uniformity seems unattainable in cases of this kind. History has shown that state courts have refused to follow federal courts in creating a uniform national system of case law [*Erie R.R. v. Tompkins*, 304 U.S. 64, 74 (1938)], and it is even less likely that state legislatures would be induced by a federal court rule granting relief in a certain cause of action to change existing legislation which restricts or abolishes the right in state courts.

29. *RESTATEMENT, JUDGMENTS* § 49 (1942); see *Wiggins Ferry Co. v. Ohio & M. Ry.*, 142 U.S. 396, 410 (1892); *Bank of the United States v. Donally*, 8 Pet. 361, 369 (U.S. 1834); see also 2 *FREEMAN, JUDGMENTS*, 1530-3 (5th ed. 1925). If a judgment is upon the merits of a cause of action, it is *res judicata* not only as to matters actually decided, but as to all matters that could have been raised and decided. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927); *Chicot County Drainage Dist. v. Baxter State Bank*, 303 U.S. 371 (1940); cf. *Cromwell v. County of Sac*, 94 U.S. 351 (1876).

30. A judgment in a suit dismissed for want of jurisdiction is not usually "upon the merits." *RESTATEMENT, JUDGMENTS* § 194 (1942), and see 2 *FREEMAN, JUDGMENTS* 1567-8, 1604 (5th ed. 1925). But see note 33 *infra*.

31. The North Carolina court said "we cannot hold that this [statute] . . . impinged . . . the Constitution. . . ." 220 N.C. 18 at 20, 16 S.E.2d 411 at 412.

32. Mr. Justice Reed was of the opinion that the North Carolina court had not purported to decide the constitutional issue. 67 Sup. Ct. 657 at 664.

33. It is well settled that a judgment "upon the merits" is *res judicata* as to matters necessarily decided. *Grubb v. Public Utilities Comm'n*, 281 U.S. 470 (1930) and see 2 *FREEMAN, JUDGMENTS* 1462-8 (5th ed. 1925). There is no reason why such a rule should not be equally applicable to a judgment not "upon the merits."

An alternative approach is to argue that the North Carolina court's decision was "on the merits" of the jurisdictional question. See *id.* at 1532-3 and n. 16. If this concept be adopted, the constitutional issue was then clearly *res judicata* whether the issue was "necessarily decided" or merely "could have been raised and decided." See note 29 *supra*.

But the result of the application of these *res judicata* rules seems somewhat harsh.<sup>34</sup> Reasonably relying upon the *Lupton* case, Bullington forewent an appeal of the constitutional issue to the Supreme Court<sup>35</sup> in favor of a new suit in a federal court. After winning both in the district and circuit courts, he was informed by the Supreme Court that he had erred in relying on what was now declared to be "obsolete" doctrine; nor could he then raise the constitutionality of the North Carolina statute, for this was *res judicata*. And he could no longer appeal the North Carolina decision directly, the time for appeal having long since expired.<sup>36</sup> The net result was to deprive Bullington of a reasonable opportunity to secure an authoritative adjudication of whether or not the North Carolina statute deprived him of his constitutional rights.<sup>37</sup>

Certainly aware of this consequence, the Court might well have permitted Bullington a second chance to argue the constitutionality of the statute.<sup>38</sup> Two

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34. "Policy" reasoning on another level can lead to a different conclusion. In view of the facts of the case (see note 8 *supra*) the court majority may have been intent upon preventing a deficiency recovery rather than constructing a logical procedural edifice. This would not represent a new approach to the airy concepts in this type of case. See Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 192-3 (1933). But it is a highly conjectural hypothesis and this Note can do no more than suggest the possibility of its existence.

35. It is difficult to predict what the Supreme Court would have decided as to the constitutionality of the statute, had the issue been properly appealed to it. A number of constitutional objections could have been made, of which the most important would have been the due process clause of the Fourteenth Amendment (U.S. CONST. AMEND. XIV, § 1) and, if the cause of action could be said to rest upon a Virginia statute, *e.g.*, NEGOTIABLE INSTRUMENTS LAW, VA. CODE, c. 233 (1942), the full faith and credit clause. Recent analogous cases involving these clauses have turned upon such vague standards as the weight to be accorded "the governmental interests of each jurisdiction" (*Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532 (1935)) and the existence of "a public policy" of the forum sufficiently important to render constitutional its refusal to apply the foreign law. *Griffin v. McCoach*, 313 U.S. 498 (1941). For discussion of the constitutionality of the North Carolina statute, see 21 IND. L.J. 228, 229-31; 24 N.C.L. REV. 267, 272-4; 13 U. OF CHI. L. REV. 195, 200-1 (1946).

36. At most, a five month period was available. See 43 STAT. 940 (1925), as amended, 45 STAT. 54 (1928), 28 U.S.C. § 350 (1940). Since the North Carolina decision was entered in September, 1941 and the Supreme Court decision was rendered in February 1947, it was obviously impossible for Bullington to appeal the North Carolina decision at that point.

37. Compare, with the instant case, *American Surety Co. v. Baldwin*, 287 U.S. 156 (1932) where it was held that the refusal of a state supreme court to permit an appeal, because of a failure seasonably to comply with a procedural rule, did not constitute a deprivation of due process, and thus did not justify a collateral attack upon the trial court judgment in a federal court.

38. To permit a second attack upon the statute's constitutionality may be thought to contradict the well-established Supreme Court policy of refusing to consider a constitutional issue when there exists some other ground upon which a case can be decided. *E.g.*, *Municipal Investors Ass'n v. Birmingham*, 316 U.S. 153 (1942); *Berea College v. Kentucky*, 211 U.S. 45 (1908); see also the concurring opinion of Mr. Justice Brandeis in

lines of approach were available. The first would have been to exempt Bullington from the retroactive repudiation of the *Lupton* rule, and declare that, from that point forward, the *Erie* doctrine would be interpreted to include statutes of the kind involved here. The use of this technique would not only have produced a fairer holding, but would have found support in precedent.<sup>39</sup>

The second approach would have been for the Court to find that two separate constitutional issues existed, only one of which became res judicata by the North Carolina decision. The first issue would have been whether a state statute which denies to state courts jurisdiction to hear an action for a deficiency judgment violates the Constitution. The North Carolina court's negative answer to this question would have been res judicata. But that court's decision was apparently founded on the theory that the statute merely deprived Bullington of a forum, not of a right. Such theory became too limited, however. If—as the Court majority actually decided—the statute were also to be applied by the North Carolina federal court, Bullington would have been deprived of any practical chance to secure a judgment. Thus construed, the case presented a second constitutional issue—either the constitutionality of the state statute when also applied by a federal court, or, more probably, the constitutionality of the federal Rules of Decision Act when so applied to a state statute as to deprive a mortgagee of a well-established legal right.<sup>40</sup> In either case, questions of full faith and credit and due process would arise,<sup>41</sup> and, in either case, the problem—neither decided

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*Ashwander v. TVA*, 297 U.S. 288, 345-8 (1936). Although such a policy may be generally sound, it is questionable when applied so as to produce an inequitable result. *Cf.* 87 U. P.A. L. Rev. 610 (1939).

39. *Gelpcke v. Dubuque*, 1 Wall. 175 (U.S. 1863); see *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. 416, 432 (U.S. 1853); see also *Snyder, Retrospective Operation of Overruling Decisions*, 35 ILL. L. REV. 121, 130 and n. 101 (1940); *cf.* *Great Northern Ry. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932). For discussion of the doctrine that overruling decisions should not be applied retroactively, see *Snyder, supra* at 130-53, and *Radin, The Trail of the Calf*, 32 CORN. L. Q. 137, 154-5 (1946). Compare, with the instant case, *Kalb v. Feuerstein*, 308 U.S. 433 (1940), where the court refused to apply the doctrine of res judicata because of what it regarded as an overriding congressional policy; see *Boskey and Braucher, Jurisdiction and Collateral Attack*, 40 COL. L. REV. 1006, 1016-9 (1940).

40. If it is true that a state statute cannot affect the jurisdiction of a federal court (see p. 1040 *supra*), and that it is the Rules of Decision Act that forces the federal court to apply the state statute, it is conceptually difficult to hold that the state statute may become unconstitutional by being applied by a federal court. It seems more logical to question the constitutionality of the federal statute, when so applied.

No case has been found in which such an analysis of a constitutional issue has been made, but it would appear that there was little need for making such a division. Often, a state statute has been found unconstitutional as applied in the state court [*e.g.* *Broderick v. Rosner*, 294 U.S. 629 (1935)] and there was no need to go on to inquire as to its effect in a federal court. Furthermore, in none of these cases was there a need to protect a litigant against the unfair application of standard rules of res judicata.

41. If the issue were the constitutionality of the state statute, questions of full faith and credit, and of due process under the Fourteenth Amendment would arise; see note 35

nor presented in the state court—could hardly be termed *res judicata*.<sup>42</sup> Even if the *Erie* rule is one which the Constitution requires,<sup>43</sup> the second constitutional question might still exist. There is, of course, strength in the argument that when application of a statute is forced by the Constitution the statute is rendered immune; but it is equally plausible to argue that such a constitutional requirement would be subject to limitations imposed by other sections of the Constitution, *e.g.*, the Fifth Amendment and the full faith and credit clause. In any event, the view that *Erie* has a constitutional basis is dubious, at best.<sup>44</sup> It does not seem unreasonable, therefore, to break up the question of constitutionality into two issues.

Whether just or unjust, however, the holding in the *Bullington* case is not so important as its possible effect on future decisions; but the lack of clarity in the majority opinion makes prediction of the case's value as precedent as hazardous as the interpretation of its rationale.

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*supra*. If the issue were the constitutionality of the Rules of Decision Act, questions of full faith and credit and of due process under the Fifth Amendment would be presented. As to the full faith and credit problem, see note 35 *supra* and *cf.* *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932). As to the due process issue, *cf.* *Wright v. Union Central Life Ins. Co.*, 304 U.S. 502 (1938); *Louisville Bank v. Radford*, 295 U.S. 555 (1935). It might also be possible to raise an issue under the Tenth Amendment. *Cf.* *Wright v. Union Central Life Ins. Co.*, *supra*, at 516-8.

It has been held that Congress may withhold jurisdiction from any court created by it, a power which extends to the federal district courts. *Stevenson v. Fain*, 195 U.S. 165 (1904); *Sheldon v. Sill*, 8 How. 441 (U.S. 1850). However, it has been said that this power is subject to constitutional limitations. See *Kline v. Burke Constr. Co.* 260 U.S. 226, 234 (1922).

42. Nor is it likely that the state court would have decided the issue had it been presented. Since it was unnecessary to do so, that court probably would have refused to decide the applicability of a *federal* court rule, the *Erie* doctrine, to the statute, particularly since an affirmative answer would have necessitated the court's facing another constitutional issue.

If the argument that the jurisdictional decision was "on the merits" were employed, (see note 33 *supra*) the possibility of the second constitutional question being considered *res judicata*, as a "matter which could have been raised and decided," is apparent. But, as stated above, the North Carolina court would probably have been unwilling to decide the question. And it is not unreasonable to predict in retrospect that the Supreme Court, had it been faced with a direct appeal from the North Carolina judgment, might also have refused to decide the question; this would have been in accord with its general policy of restricting the use of constitutional doctrines, especially where the constitutional issue was not raised below. Moreover, *Bullington* could well have relied on the doctrine of "option" to litigate an unraised matter in a second suit. See 2 FREEMAN, JUDGMENTS, 1424 (5th ed. 1925).

43. In the *Erie* case, Mr. Justice Brandeis stated that neither Congress nor the federal courts had any power to declare substantive rules of common law to be applied in federal courts. 304 U.S. 64 at 78-80.

44. Mr. Justice Brandeis' dictum in the *Erie* case did not command the support of all of the majority justices at the time and seems to have been carefully avoided by the Court ever since. Moreover, his statement appears to have been generally criticized by the commentators. See Clark, *supra* note 21, at 273 and n. 27, 278-9 and n. 49.



As to *res judicata*, it would appear that the Court intended to make no change in existing doctrine.<sup>45</sup> However, since it is possible to interpret the decision as making such a change,<sup>46</sup> it may not be unreasonable to anticipate deviational decisions in the lower federal courts. One thing is clear: the Supreme Court apparently will not hesitate to apply the rule of *res judicata* to a litigant who fails to take advantage of his chance for a direct appeal on a constitutional issue.<sup>47</sup>

The case may also lead to other extensions of the *Erie* rule. It might, for example, presage a holding that *forum non conveniens* is "substantive", a question left open by the Supreme Court.<sup>48</sup> There is some analogy between a state legislative policy of the kind involved in the *Bullington* case and a state judicial policy of refusal to exercise jurisdiction in a case involving a foreign cause of action and one or more non-resident parties when to do so would seriously inconvenience the court or be vexatious or oppressive to a non-resident party.

The policy considerations underlying the *Erie* doctrine, however, do not justify its application to *forum non conveniens* rules. For perhaps the basic purpose of the *Erie* doctrine is to prevent different legal treatment of parties merely because there is a variation in the residence of their opponents.<sup>49</sup> Thus, in a case not involving a *forum non conveniens* problem, if a federal court were free to apply its own rules of substantive law, the rights of two resident plaintiffs might vary according to the purely fortuitous circumstance of

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45. Since the Court apparently believed that there was but one constitutional issue, its decision was probably based upon the usual rule of *res judicata* stated in the text. See p. 000 *supra*. Nor does the case indicate how the Court would decide the issue of whether state rules of *res judicata* are "substantive" under the *Erie* doctrine, a question left open in *Heiser v. Woodruff*, 327 U.S. 726 (1946).

46. See p. 1041 *supra*.

47. Cf. *Grubb v. Public Utilities Comm'n*, 281 U.S. 470 (1930). In that case, which involved the constitutionality of an order of the defendant Commission, the plaintiff failed to appeal from a state supreme court decision (which was on the merits) upholding the order, but continued to press a collateral attack upon the order in a federal court. Upon appeal from the federal court, the Supreme Court held that the entire matter became *res judicata* by the state court's decision.

This policy is also in accord with the Court's disapproval of an attempt to raise, for the first time, constitutional issues in a collateral suit. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940).

48. In *Koster v. Lumbermen's Mut. Casualty Co.*, 67 Sup. Ct. 828, 834 (1947) and *Gulf Oil Corp. v. Gilbert*, 67 Sup. Ct. 839, 843 (1947), the Court found it unnecessary to decide the question, since the state rule was the same as the federal rule. The trend in the lower federal courts appears to be toward characterizing the doctrine as "procedural," and hence not subject to the *Erie* rule. *Koster v. Lumbermen's Mut. Casualty Co.*, 153 F.2d 888 (C.C.A. 2d 1946) *aff'd on other grounds* 67 Sup. Ct. 828 (1947); *Gilbert v. Gulf Oil Corp.*, 153 F.2d 883 (C.C.A. 2d 1946) *rev'd on other grounds* 67 Sup. Ct. 839 (1947); see *Overfield v. Pennroad Corp.*, 113 F.2d 6 (C.C.A. 3d 1940). *Contra*: *Weiss v. Routh*, 149 F.2d 193 (C.C.A. 2d 1945).

49. *Erie R.R. v. Tompkins*, 304 U.S. 64, 74-7 (1938). And see Shulman, *The Demise of Swift v. Tyson*, 47 YALE L.J. 1336, 1347 (1938).

whether their opponents were residents, or non-residents upon whom service could be had. A resident plaintiff whose opponent was a resident would be limited to the state courts; a resident plaintiff whose opponent was a non-resident upon whom service could be had could take advantage of the different rules obtaining in the federal forum. Since the *mere* difference in residence of the defendants is an insufficient reason for different legal treatment of the plaintiffs, the *Erie* rule is necessary.<sup>50</sup> In a case involving a forum non conveniens problem, however, there may be sound reasons for different treatment: serious inconvenience to the non-resident defendant or the court, and the probability that federal courts would accord fairer treatment to non-residents claiming inconvenience of forum.<sup>51</sup> No unjust discrimination would result,<sup>52</sup> for the disparity is based upon something more than a difference in residence.<sup>53</sup>

Conceivably, the *Bullington* case might also be used as a precedent for characterizing as "substantive" under *Erie* a state statute giving exclusive jurisdiction of a certain cause of action to a particular state court.<sup>54</sup> But,

50. This reasoning would of course apply with equal force to cases where the non-resident was a plaintiff.

51. Since the purpose of giving federal courts diversity jurisdiction was to prevent non-resident parties from being subjected to the possibility of local prejudice, [see *Bank of the United States v. Deveaux*, 5 Cranch 61, 87 (U.S. 1809)], and since such prejudice could easily arise in a case where a non-resident claims inconvenience of forum, it is desirable that federal courts be free to apply their own rule of forum non conveniens.

52. Admittedly, some discrimination would still exist. For example, if the amount in controversy did not exceed the requisite \$3,000, a resident plaintiff whose opponent was a non-resident would be limited to the state courts, where a different forum non conveniens rule might be applied.

53. Of course, the failure to apply *Erie* to the rule may produce non-uniformity within a state, but the elimination of discrimination rather than the achievement of uniformity, is the basic philosophy underlying *Erie*; see note 49 *supra*.

It has also been suggested that requiring federal courts to apply state rules of forum non conveniens might seriously affect their trial convenience and dockets. See 1 MOORE'S FED. PRACTICE 84 (1946 Supp.).

54. The existing rule is that such statutes do not affect the jurisdiction of federal courts. *Payne v. Hook*, 7 Wall. 425 (U.S. 1868); *Union Bank v. Jolly's Adm'rs*, 18 How. 503 (U.S. 1855); *Waterman v. Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909); *Blacker v. Thatcher*, 145 F.2d 255 (C.C.A. 9th 1944), *cert. denied* 324 U.S. 848 (1945); *Miami County Nat. Bank v. Bancroft*, 121 F.2d 921 (C.C.A. 10th 1941) (statutes giving exclusive jurisdiction of suits against executors and administrators to state probate courts); *Cf. Vanderwater v. City Nat. Bank*, 28 F. Supp. 89 (E.D. Ill. 1939); *Peterson v. Demmer*, 34 F. Supp. 697 (N.D. Tex. 1940) (suit removed to federal court from state probate court given exclusive jurisdiction by state statute). A case like *Suydam v. Broadnax*, 14 Pet. 67 (U.S. 1840), usually cited in support of this proposition, seems of doubtful weight, since it involved a state non-claims statute, which would seem to fall under the rule established by the *York* case (state statute of limitations is "substantive" under *Erie* doctrine); *Cf. Dombrowski v. Dunn*, 69 F. Supp. 42 (D.Vt. 1946) (state non-claims statute applied without mention of *Erie* doctrine). Another line of cases in support of the doctrine is: *Chicot County v. Sherwood*, 148 U.S. 529 (1893) (statute limiting actions against a county to county court of defendant county); *City of Hollis ex rel. Kearns v. Carrell*, 42

since such a statute, unlike the North Carolina statute in the instant case, does not deprive *all* state courts of jurisdiction, the mere exercise of jurisdiction by a federal court will not produce a "substantially different result" and, therefore, the *Erie* rule seems inapplicable.<sup>55</sup>

However, the instant case may be of real importance as a precedent in clearing away what remains of the equitable remedial rights doctrine,<sup>56</sup> *i.e.*, that a federal court is bound to follow state law as to equitable "substantive rights" but not as to equitable "remedies."<sup>57</sup> For example, a state statute allowing an unsecured simple contract creditor of an insolvent corporation to apply for a receiver before reducing his claim to judgment is not enforceable in a federal court, because it confers a mere "remedial right;"<sup>58</sup> on the other hand, a state statute authorizing a claimant out of possession of vacant land to bring a suit to quiet title against his rivals is enforceable in a federal court since it creates a "substantive right."<sup>59</sup>

Although much criticized by commentators<sup>60</sup> and somewhat narrowed by the *York* decision,<sup>61</sup> the doctrine was still given approval in the *York* case,<sup>62</sup> and it is being applied by many lower federal courts.<sup>63</sup> The instant case es-

F. Supp. 893 (W.D. Okla. 1941) (statute limiting action on paving bonds to state court); *Chicago & N.W. Ry. v. Whitton's Adm'r*, 13 Wall. 270 (U.S. 1871) (wrongful death statute permitting recovery in state courts only). *Cf.* *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922) (statute revoking foreign corporation's license to do business if it sought the jurisdiction of a federal court held unconstitutional).

55. It is, of course, possible that the supposed absence of local bias in a federal court might produce a "substantially different result" than if the same suit were maintained in a state court. But, the possibility of this result does not justify the application of the *Erie* doctrine, since the very purpose of giving federal courts diversity jurisdiction was to prevent non-resident suitors from being subjected to the possibility of local prejudice. *See Bank of the United States v. Deveaux*, 5 Cranch 61, 87 (U.S. 1809).

56. Since, however the *Bullington* case was an action at law, [*Noonan v. Lee*, 2 Black 499 (U.S. 1862)], while the rule under discussion involves suits in equity, the value of the *Bullington* case as a precedent may be somewhat weakened.

57. For a comprehensive discussion of this doctrine, see Comment, 55 *YALE L. J.* 401 (1946). Properly included within the scope of the doctrine is the rule that a state statute which creates an adequate remedy at law in a state court, and hence bars an equitable remedy in a state court, will not affect the "equity jurisdiction" of a federal court in that state. For a discussion of this rule see *id.* at 406-7. While this rule has been stated to be one relating to the "jurisdiction" of federal courts (*Ibid.*) it would appear that it is more properly classified as a part of the equitable remedial rights doctrine. "Equity jurisdiction" refers to the propriety of granting equitable relief, while "jurisdiction" *per se* relates to the *power* of a court to hear and determine a cause. *See* 1 *MOORE'S FED. PRACTICE* 186 (1938).

58. *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491 (1923).

59. *Holland v. Challen*, 110 U.S. 15 (1884).

60. *See* Comment, 55 *YALE L. J.* 401, 416-20 (1946); 1 *MOORE'S FED. PRACTICE* 56-8, 114 (1946 Supp.).

61. The case held that state statutes of limitations must be followed by a federal court in an "equity" suit.

62. 326 U.S. at 105-8, 112.

63. *See* Comment, 55 *YALE L. J.* 401, 402, 419-20 (1946).

establishes the rule that a state statute denying "jurisdiction" over a cause of action to all state courts, if constitutional, is binding upon the federal courts sitting in that state. Consistency would appear to demand that a state statute regulating the equitable "remedies" which all state courts are authorized to give should be equally binding upon the federal courts. But more than logic is involved. Both rules are concerned with the same policy consideration: the effect that a federal court should give to a state statute which substantially affects the enforcement of legal rights in state courts. And both, therefore, deserve the same treatment.

On balance, while the holding in the *Bullington* case appears open to question<sup>64</sup> and its effects on res judicata uncertain, the extension made of the *Erie* rule seems desirable and may prove of value as a precedent in eliminating some of the obsolete doctrine relating to the powers of federal courts.

## DISCHARGE BASED ON UNION REPRISAL FOR SUPPORT OF RIVAL UNION UNDER THE NATIONAL LABOR RELATIONS ACT

ALTHOUGH labor agreements requiring union membership as a condition of employment<sup>1</sup> are expressly permitted by the National Labor Relations Act,<sup>2</sup> discharge of employees expelled from a union can be designated an unfair practice under NLRB policy. This policy, initiated in 1942,<sup>3</sup> terms the dis-

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64. But see note 34 *supra*.

1. The essential characteristic of such contracts, for the purpose of this Note, is that they require the employer to discharge at union request any employee excluded, expelled or suspended from the contracting union. There are almost 11,000,000 workers subject to such provisions. N.Y. Times, April 21, 1947, p. 3, col. 3. See also Summers, *The Right to Join a Union*, 47 COL. L. REV. 33, 42 (1947); *The Question of Outlawing the Closed Shop*, 26 CONG. DIG. 33, 40 (1947); EXTENT OF COLLECTIVE BARGAINING AND UNION RECOGNITION, 1945 BUREAU LABOR STATISTICS BULL. No. 865 (1946). Such contracts may provide for hiring only those already union members (closed shop), for all those hired to become union members within a certain time period (union shop), for those employees who indicate they are union members at the beginning of the labor agreement to remain union members in good standing (maintenance-of-membership), or for a preference to be given union members in hiring, which would be equivalent to the closed shop as long as the union is able to supply the employer's entire labor needs.

The Effects of the Labor-Management Relations Act (Taft-Hartley Act), 15 U.S.L. WEEK 117 (June 23, 1947), have not been considered in this Note.

2. Section 8 (3) of the Act, hereafter cited by section only. 49 STAT. 449, 452 (1935), 29 U.S.C. § 158 (3) (1940), quoted note 22 *infra*.

3. Rutland Court Owners, Inc., 44 N. L. R. B. 587 (1942), *aff'd on rehearing*, 46 N. L. R. B. 1040 (1943). Two weeks prior to the termination of the labor agreement, the employees in question made evident their desire for a change in the bargaining representative. The incumbent union, holding a closed shop contract, requested and obtained their discharge. The employees were ordered reinstated with back pay. Board Member

charge an unfair practice when the employer had prior notice<sup>4</sup> that the union expelled the employee in retaliation for his support of a rival union during the "appropriate time"<sup>5</sup> for a change in employee representation.<sup>6</sup> Apparently

Leiserson dissented on the ground that the discharges were in fulfillment of a contract valid under the Act; if an injustice had been done, it was for Congress and not the Board to act. *Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, 603 (1942).

In another 1942 decision basic to the subject policy, the Board found that an employer could not discharge employees under a closed shop contract, when he signed the contract with the knowledge that those employees would not be admitted to the union. *Monsieur Henri Wines, Ltd.*, 44 N. L. R. B. 1310 (1942).

This issue had apparently not directly arisen prior to 1942. In *Ansley Radio Corp.*, 18 N. L. R. B. 1028 (1939), it was held to be an unfair labor practice for the employer to discharge in anticipation of the union's expulsion of the employees, where the union had not yet acted; *but cf.* *United Fruit Co.*, 12 N. L. R. B. 404 (1939); *Taylor Milling Corp.*, 26 N. L. R. B. 424 (1940). The latter two cases were overruled in *Federal Engineering Co.*, 60 N. L. R. B. 592, 593 n. 1 (1945), *enforced in this respect*, 153 F.2d 233 (C.C.A. 6th 1946). In *American-West African Lines, Inc.*, 21 N. L. R. B. 691 (1940), the firm was ordered to grant a competing union access to the ships equal to that granted the incumbent union, despite a closed shop agreement.

For a discussion of these cases, see Note, *Effect of Closed Shop Contract on Employer Practices Otherwise Unfair Under the NLRA*, 56 HARV. L. REV. 613 (1943); Murdock, *Some Aspects of Employee Democracy Under the Wagner Act*, 32 CORN. L. Q. 73, 92-5 (1946).

4. Lack of knowledge by the employer excuses him. *Diamond T Motor Car Co.*, 64 N. L. R. B. 1225 (1945) (employer not obligated to make inquiries); *Spicer Mfg. Corp.*, 70 N. L. R. B. 41 (1946) (knowledge of foreman not imputed to employer, unless employee specifically requests that employer be informed); *but cf.* *Lewis Meier & Co.*, 72 N. L. R. B. No. 106 (April 24, 1947) (where employer is advised by rival union of possible reprisals against its adherents, he has duty to inquire of expellees whether they are delinquent in dues as incumbent union charges); *Colgate-Palmolive-Peet Co.*, 70 N. L. R. B. 1202 (1946) (employer should have realized, from his general knowledge of the unions' rivalry, and the fact that 37 employees had been suspended—not yet expelled—that the discharges reflected reprisals for union activity).

5. "The employees' right to select representatives to be meaningful must necessarily include the right at some appropriate time to change representatives." *Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, 596 (1942). The "appropriate time" concept represents the Board's balance between the objectives of industrial stability and individual freedom implicit in § 1 of the Act. The "appropriate time" occurs toward the end of the life of the labor agreement. A recent comprehensive discussion of the circumstances under which the Board may regard the time for questioning a union's certification to be appropriate is Cushman, *The Duration of Certifications by the National Labor Relations Board and the Doctrine of Administrative Stability*, 45 MICH. L. REV. 1 (1946). See also Murdock, *supra* note 3, at 75-83, 98-9; Comment, 51 YALE L. J. 465 (1942). *Compare* *International Shoe Co.*, 71 N. L. R. B. No. 207 (Dec. 31, 1946), *with* *Housting Packing Co.*, 71 N. L. R. B. No. 195 (Dec. 19, 1946); See *Lewis Meier & Co.*, *supra* note 4. The Board's current policy is to protect the union's certification from challenge for as long a contract period as two years. *Reed Roller Bit Co.*, 72 N. L. R. B. No. 157 (Feb. 26, 1947).

It is the time of the individual's activity that is the relevant consideration, and not the time of the expulsion. *Southwestern Portland Cement Co.*, 65 N. L. R. B. 1 (1945) (employee's activity a few months *after* signing of contract is valid ground for expulsion and discharge; if the activity had been directed toward a change at the appropriate

approved by the Supreme Court's 1944 decision in *Wallace Corporation v. NLRB*,<sup>7</sup> the policy has recently been reviewed by three circuit courts and is headed for another Supreme Court test.<sup>8</sup>

In the three cases, involving findings of unfair labor practice and orders of reinstatement with back pay, two circuits upheld the Board and one, in effect, ruled against it. In *Local No. 2880, Lumber & Sawmill Workers v. NLRB*,<sup>9</sup> the expelled union member had acted as an observer for the losing union at an NLRB election; the Ninth Circuit decreed enforcement of the Board order. The Board was upheld also by the Second Circuit in *NLRB v. American White Cross Laboratories*,<sup>10</sup> where the expellee, the leader of the opposing union movement, had testified at a Board hearing held to determine whether an election should be ordered. The Seventh Circuit, however, by implication ruled against the Board in *Aluminum Company of America v. NLRB*,<sup>11</sup> which also involved an expulsion for rival union activity; there the court, ruling that a maintenance of membership contract was still in effect, vacated the Board's order with only incidental discussion of the instant issue.

Having become something of a touchstone in these cases, the *Wallace* opinion<sup>12</sup> deserves analysis. A history of bitter company opposition to the CIO

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time rather than immediately, the decision might have been otherwise. See pp. 5-6); *The Cliffs Dow Chemical Co.*, 64 N. L. R. B. 1419 (1945) (postponing discharge until after the election does not excuse a charge of unfair practice based on knowledge of union reprisal for activities during the "appropriate time").

6. Where the two requirements of notice and "appropriate time" are met, there is an unfair practice. 11 N. L. R. B. ANN. REP. 42 (1947); *Rheem Mfg. Co.*, 70 N. L. R. B. 57 (1946) (it is irrelevant that expellees, as shop committee members, owed union greater loyalty); *Eureka Vacuum Cleaner Co.*, 69 N. L. R. B. 878 (1946) (union threat to evict employees forcefully no justification).

It should be noted that the policy does not abrogate the closed shop contract. Expulsions for any cause but dual unionism, and also for that cause where the activity does not occur during the "appropriate time," are not affected. *NLRB v. McGough Bakeries Corp.*, 153 F.2d 420 (C. C. A. 5th 1946) (failure to pay union dues valid ground for discharge); *Southwestern Portland Cement Co.*, *supra* note 5; *Utica & Mohawk Cotton Mills, Inc.*, 51 N. L. R. B. 257 (1943) (employees who indicate their desire to withdraw from the union and are subsequently expelled, may be discharged); *cf. Hall Freight Lines, Inc.*, 65 N. L. R. B. 397 (1946).

For general discussion of Board policy on discharges for "appropriate time" activity, see 2 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 324 (1940 and Cum. Supp. 1946).

7. 323 U.S. 248 (1944).

8. Petition for certiorari in *Local No. 2880, Lumber & Sawmill Workers v. NLRB*, 158 F.2d 365 (C. C. A. 9th 1946), has been granted. 15 U. S. L. WEEK 3420 (1947).

9. 158 F.2d 365 (C. C. A. 9th 1946), enforcing 64 N. L. R. B. 159 (1945).

10. 160 F.2d 75 (C. C. A. 2d 1947), enforcing 66 N. L. R. B. 866 (1946).

11. 159 F.2d 523 (C. C. A. 7th 1946), reversing 68 N. L. R. B. 750 (1946).

12. *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944), affirming 141 F.2d 87 (C. C. A. 4th 1944), enforcing 50 N. L. R. B. 138 (1943), rehearing denied, 324 U.S. 885 (1945). This was a 5-4 decision; the majority opinion was written by Mr. Justice Black, the dissent by Mr. Justice Jackson. The two members of the Court not on the present bench, Chief Justice Stone and Mr. Justice Roberts, joined in the dissent.

climaxed in a strike and the formation of an independent union. At the intervention of the Board, the Wallace Company signed a consent agreement promising not to interfere with either union and to grant a closed shop contract to the one winning the Board election. The independent won, and, before the contract was signed, informed the employer that it was planning to exclude from its membership 43 employees who had been most active for the CIO. Despite this knowledge, the company signed the closed shop contract and, at the request of the union, discharged the 43. The discharges were claimed to be unfair labor practices and, after investigation, the Board so held, finding also that the independent had been company-dominated prior to the consent agreement. Its resulting order, reinstating the employees with back pay and disestablishing the independent union, was upheld by the Court.

At first blush the circumstances of the *Wallace* case may be distinguished from those in the principal cases in at least two respects. The first is that the employers in the current cases had no knowledge of the union's intentions when they signed the labor agreements. The validity of this distinction, however, is minimized in that the Wallace Company was merely following in good faith<sup>13</sup> the terms of the consent agreement, made with no knowledge that the winning union would demand discharge of rival adherents. Moreover, Board policy requiring only that employers have notice of the basis of the union's action before discharging raises the possibility of the discharge being held a violation;<sup>14</sup> thus, the state of mind of the employer when he makes the discharges rather than when he signs the contract would appear the appropriate criterion.<sup>15</sup> The second distinction is that the *Wallace* case involved a com-

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13. The majority opinion said there was no "conspiracy," *Wallace Corp. v. NLRB*, 323 U. S. 248, 252-3 (1944), while the dissent emphasized the positive good faith of the employer, *id.* at 260-4, 266-7, 272.

14. See note 4 *supra*.

15. Thus, the principal cases would seem similar to the earlier ones in which the policy was established, see note 3 *supra*, although the *Local 2880* case was apparently the first in which a discharge was held an unfair practice when the employer acted *after* the signing of the *new* valid labor agreement. For a discussion emphasizing this distinction, see Frieden, *Some New Discharge Problems Under Union Security Covenants*, (1946) *Wis. L. Rev.* 440, 445-6, 449-50, the author stating that the Board has adhered to a good faith test in alleging unfair practice, so that employers might be excused on the plea that they were merely obeying valid contracts. It would seem more accurate, however, to say that where the Board finds a violation of the Act, the good faith of the employer is considered irrelevant. *NLRB v. Gluck Brewing Co.*, 144 F.2d 847 (C. C. A. 8th 1944); *NLRB v. Hudson Motor Car Co.*, 128 F.2d 528 (C. C. A. 6th 1942); *McQuay-Norris Mfg. Co. v. NLRB*, 116 F.2d 748 (C. C. A. 7th 1940); *NLRB v. Star Publishing Co.*, 97 F.2d 465 (C. C. A. 9th 1938); *Greer Steel Co.*, 38 N. L. R. B. 65 (1942); *Cape Cod Trawling Corp.*, 23 N. L. R. B. 208 (1940). *Contra*: *New York & Porto Rico S.S. Co.*, 34 N.L.R.B. 1028 (1941); *McKesson & Robbins, Inc.*, 19 N.L.R.B. 778 (1940).

That the Board might have found a legitimate ground for the discharge does not prevent it from reaching a finding of unfair practice. *NLRB v. Nevada Consolidated Copper Corp.*, 316 U.S. 105 (1942).

pany dominated union;<sup>16</sup> however, this is no more logical than the first. Board policy, judicially upheld,<sup>17</sup> excuses all violations prior to the signing of a consent agreement—if there are no subsequent violations.<sup>18</sup> Thus the *Wallace* discharges *per se* had to be considered an unfair practice before the question of company domination could arise; the *Wallace* case, therefore, seems decisive of the issues argued in the later cases.<sup>19</sup>

The *Wallace* case, with the *Local 2880* and *White Cross* decisions which cite it,<sup>20</sup> represents a preference for the right of workers to designate a bar-

16. Much of the comment on the case indicates that this is considered sufficient to distinguish the *Wallace* holding from cases, like the principal ones, in which there is an independent union. See Notes, 160 A. L. R. 918, 930, 931 n.16 (1946), 40 ILL. L. REV. 149, 150, 152 (1945), 43 MICH. L. REV. 819, 820 (1945), 3 NAT. B. J. 148, 153-4 (1945). But see Note, 58 HARV. L. REV. 448, 452-3 (1945); "In the light of the holding in the *Wallace Corp.* case, caution would seem to dictate that an employer secure assurances from a union seeking a union shop contract that such contract shall not be used to discriminate against members of a rival union or to secure the discharge of existing employees." 2 TELLER, *op. cit. supra* note 6, at 95 (Cum. Supp. 1946).

17. *Canyon Corp. v. NLRB*, 128 F.2d 953, 955-6 (C. C. A. 8th 1942); *NLRB v. Hawk & Buck Co.*, 120 F.2d 903, 905 (C. C. A. 5th 1941). Since estoppel does not apply against an administrative agency, the Board may, if it pleases, disregard any such agreement. *NLRB v. Phillips Gas & Oil Co.*, 141 F.2d 304 (C. C. A. 3rd 1944).

18. *American Bakeries Co.*, 51 N. L. R. B. 937 (1943); *Corn Products Refining Co.*, 22 N. L. R. B. 824, 828-9 (1940); *Wickwire Bros.*, 16 N. L. R. B. 316, 325-6 (1939); *Hope Webbing Co.*, 14 N. L. R. B. 55, 75-6 (1939); *Godchaux Sugars, Inc.*, 12 N. L. R. B. 568, 577-9 (1939); *Shenandoah-Dives Mining Co.*, 11 N. L. R. B. 885, 888 (1939). While the Board need not so limit itself, see note 17 *supra*, in practice it looks behind consent agreements only where there has been a subsequent violation of the Act. *Locomotive Finished Material Co.*, 52 N. L. R. B. 922, 927 (1943); *Harry A. Half*, 16 N. L. R. B. 667, 681-2 (1939); *cf. Chicago Casket Co.*, 21 N. L. R. B. 235, 252-6 (1940).

For recognition and approval of this practice in the *Wallace* decisions, see 323 U.S. at 253-5, 256-7 [at 255: "Consequently, since the Board correctly found that there was a subsequent unfair labor practice, it was justified in considering evidence as to petitioner's conduct, both before and after the settlement and certification." (emphasis added)]; and 141 F.2d at 90, 91.

19. Another possible distinction is that the principal cases involve expulsion, whereas the *Wallace* case involves original exclusion, the possible argument being that an employee already a member knows the penalties for disloyalty from the union's constitution and by-laws and from the labor agreement. See, e.g., *Southwestern Portland Cement Co.*, 65 N. L. R. B. 1, 8 (1945); Brief for Petitioners, pp. 80-1, *Local No. 2880, Lumber & Sawmill Workers v. NLRB*, 158 F.2d 365 (C. C. A. 9th 1946). The distinction appears invalid as to both the union and the employer. In either case, expulsion or exclusion, the union feels past conduct is so disloyal that future loyalty is too great a risk. That the employer must have notice (see note 4 *supra*) obviates the relevance of the distinction in so far as it is to excuse a charge of unfair practice. Compare *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (NLRA covers applicants as well as employees); *Peerless Pattern Works*, 64 N. L. R. B. 1473 (1945) (failure to re-hire because of fear of union reprisal is unfair practice).

20. Only the *White Cross* case accepts the *Wallace* decision as binding. 160 F.2d, at 77. The *Local 2880* opinion found the *Wallace* case only "supported" the instant policy, 158 F.2d at 368. The *Aluminum Co.* opinion considered the *Wallace* case "admittedly . . .



gaining representative over the right of unions to discipline their members.<sup>21</sup> No clear choice between these opposing considerations is specifically made by the Labor Relations Act but resolution of the conflict seems apparent on analysis. The power to sign a contract making union membership a condition of employment, while broadly stated, is merely permitted;<sup>22</sup> but freedom to designate representatives is expressly promoted;<sup>23</sup> it would thus seem contrary to the Act's purpose to condone petrification of the bargaining agent. Yet that would appear to be the practical result were employees to know that any overt effort directed toward a change in union representation might lead to loss of their jobs. Under agreements making union membership a condition of employment, the danger that certification permanent for all practical purposes will make unions unresponsive to their members' needs appears more substantial than the danger of ultimately weakening trade unionism.<sup>24</sup>

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inapplicable if the discharge is pursuant to an existent closed-shop agreement untainted by any unfair labor practice [in terms of company domination]. . . . it strains the imagination to see where in the Act Congress has intended that the discharges made pursuant to a valid union security contract should in themselves constitute an unfair labor practice." 159 F.2d at 526.

21. The choice is not a simple one. While a discharge under the instant circumstances does seem undemocratic, a strong case for the union power may be based on the accredited role of collective bargaining in our economy, and the general disinclination of the courts to "meddle" in internal union affairs. See note 26 *infra*. For succinct statements of the problem see METZ, LABOR POLICY OF THE FEDERAL GOVERNMENT 150-1, 166, 168-70 (1945); AMERICAN CIVIL LIBERTIES UNION, DEMOCRACY IN TRADE UNIONS 28-9 (1943).

22. Section 8 (3) of the Act provides that "It shall be an unfair labor practice for an employer. . . . By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided, That nothing in this Act . . . or in any other statute of the United States, shall preclude* an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collecting bargaining unit covered by such agreement when made." (emphasis added).

23. The declared policy of the Act is to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . ." (emphasis added), § 1, and the Act grants "Employees . . . the right to self-organization, to form, join, or assist labor organizations . . ." (emphasis added), § 7.

The right to file charges and give testimony under the Act, the method of support of a rival union leading to expulsion in the *White Cross* case, is dignified by a separate subsection, § 8(4).

Moreover, the Board has been upheld in ordering elections despite the existence of valid collective agreements. See, e.g., *Hamilton-Brown Shoe Co. v. NLRB*, 104 F.2d 49, 55 (C. C. A. 8th 1939); *NLRB v. Hollywood-Maxwell Co.*, 126 F.2d 815, 820 (C. C. A. 9th 1942); cf. *Franks Bros. Co. v. NLRB*, 321 U. S. 702 (1944); *NLRB v. Electric Vacuum Cleaner Co.*, 315 U. S. 685 (1942); *Motor Valve & Mfg. Co. v. NLRB*, 149 F.2d 247 (C. C. A. 6th 1945).

24. "If a collective bargaining contract, especially one for a closed shop, is deemed to belong to the union and not to the men, then a temporary majority may give the

Nor does the right to request an employee's discharge when he has supported the rival union during the relatively brief "appropriate time" seem essential to the performance of the union's role of bargaining representative or to the value of union security contracts.<sup>25</sup>

A desirable goal, however, should not render inviolate the means employed: the *Wallace* case may control but it may not be wise. Clearly, the abuse is basically that of union rather than employer practices; if the employee has remedies against the union, present Board policy is too indirect. But no sure remedy exists. Redress in any form<sup>26</sup> depends upon the ability to convince a

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union leadership a chance to perpetuate itself and to stifle any rank-and-file movement, through the weapon of the discharge, sanctioned by the closed-shop proviso. The closed-shop contract would become labor's Frankenstein. Only if the employees would always retain the power to change their representatives would the ground be prepared for an unceasing responsibility on the part of the leadership to the employees." ROSENFARN, *THE NATIONAL LABOR POLICY AND HOW IT WORKS* 271 (1940). But see Witmer, *Civil Liberties and the Trade Union*, 50 *YALE L. J.* 621, 630-1 (1941): "... The importance of freedom from coercion by the employer in the choice of a bargaining representative at a labor board election can only with difficulty be thought of as implying a duty on the union's part not to discipline its members if they choose to put another organization ahead of their own. The very existence of the union will often depend on its being able to do so."

25. It can hardly be argued that the closed-shop will be altered as the status most favored by unions or even that the position of the union in bargaining with the employer will be much affected. Even if it be considered that the Board policy is taking from unions a right they had before, unions would still retain adequate disciplinary power over members for enforcing the collective agreement. See note 6 *supra*. But unions never had the right to expel for activity during the NLRB election campaign, if the Board is correct in its interpretation of the public policy of the Act. Whenever a private agreement such as a closed-shop contract and a public right clash, the private agreement must give way. "Obviously employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes." *National Licorice Co. v. NLRB*, 309 U. S. 350, 364 (1940). The companies involved in the principal cases cannot then contend that the expellees, even through their unions, could have contracted away their rights under the Act to free the company from the obligation not to discriminate against them for that reason. Compare *Medo Photo Supply v. NLRB*, 321 U. S. 678, 687 (1944); *NLRB v. Walt Disney Productions*, 146 F.2d 44 (C. C. A. 9th 1945), *cert. denied*, 324 U. S. 877 (1945); *NLRB v. Reed & Prince Mfg. Co.*, 118 F.2d 874 (C. C. A. 1st 1941), *cert. denied*, 313 U. S. 595 (1945); *NLRB v. General Motors Corp.*, 116 F.2d 306 (C. C. A. 7th 1940).

Local 2880 recognized that expulsion and discharge could not be justified under every circumstance, by referring to the *White Cross* case as "foreign to the issue here" because of the "complete immunity . . . under Section 8 (4) of the Act" to those testifying at a Board hearing. Brief for Petitioners, p. 54, n.19, *Local No. 2880, Lumber & Sawmill Workers v. NLRB*, 158 F.2d 365 (C. C. A. 9th 1946). No explanation was offered of why § 8 (4), and § 8 (4) only, gave rights to individuals which a closed shop contract could not invade. It seems more reasonable to read all the specific provisions of the Act in the light of its general purposes. The Board's interpretation of the purposes and public rights granted by the Act has been upheld in recognition of its experience and skill. See note 41 *infra*.

26. Against the union, possible remedies include damages (which supposedly are

court that the situation warrants exception to the general concept that courts will not interfere with the internal affairs of fraternal organizations.<sup>27</sup> And decisions granting relief rest most commonly on a violation of due process in the expulsion procedures,<sup>28</sup> a doctrine unavailable to the employees in the principal cases.<sup>29</sup> Admittedly, in cases involving the substantive rights of expellees, reinstatement to membership and damages for loss of wages have been granted under circumstances similar to those of the *White Cross* and *Local 2880* cases.<sup>30</sup> Also, there is some recent precedent for applying the due

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more easily obtained than any other relief, see Witmer, *supra* note 24, at 63 n. 35) reinstatement to membership, and enjoining execution of the labor agreement and interference with plaintiff's employment contract. See Notes, 56 YALE L. J. 731, 733-4, n.15-6, 18-21 (1947), 51 YALE L. J. 331 (1941), 49 YALE L. J. 754 (1940), *Closed Shops and Closed Unions*, 160 A. L. R. 918 (1946), *Liability of Labor Union or Its Members for Unlawful Suspension or Expulsion of Member*, 62 A. L. R. 315 (1929), *Actions Against Labor Unions for Inducing Breach of Contract*, 32 ILL. L. REV. 611 (1938).

There seems little chance for a successful direct suit against the employer. Since he presumably acts in good faith under a valid contract, an independent cause of action is not created; and a suit based on an "unfair labor practice" would fail because of "exclusive" Board jurisdiction; §10(a).

27. See Summers, *supra* note 1, at 37-9; Bernhardt, *The Right to a Job*, 30 CORN. L. Q. 292, 307-13 (1945); Newman, *The Closed Union and the Right to Work*, 43 COL. L. REV. 42, 45-52 (1943); Chafee, *The Internal Affairs of Associations Not For Profit*, 43 HARV. L. REV. 993 (1930); Comments, 51 YALE L. J. 1372 (1942), 45 YALE L. J. 1248 (1936); Note, 56 YALE L. J. 731, 734 n.17 (1947), and A. L. R. Notes cited note 26 *supra*. "For the most part, in contests between union and member, the courts are supporting the former's claim of authority to make general rules determinative of who shall and who shall not be employed." Witmer, *supra* note 24, at 624.

At common law, unincorporated associations were not suable; few states retain this view today. See, generally, Witmer, *Trade Union Liability: The Problem of the Unincorporated Association*, 51 YALE L. J. 40 (1941); Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L. J. 383 (1924); Notes, *Liability of Unincorporated Labor Organization to Suit*, 149 A. L. R. 503 (1944), 27 A. L. R. 785 (1923).

28. See Murdock, *supra* note 3, at 85; AMERICAN CIVIL LIBERTIES UNION, *op. cit. supra* note 21, at 29-30, and (for cases) Supplement, 18-22; Witmer, *Civil Liberties and the Trade Union*, 50 YALE L. J. 621, 630-4 (1941); Chamberlain, *The Judicial Process in Labor Unions*, 10 BROOKLYN L. REV. 145, 160-5, 167-8 (1940); Steever, *The Control of Labor Through Union Discipline*, 16 CORN. L. Q. 212, 218-25 (1931).

29. There were apparently no procedural irregularities justifying court action. The expellee in the *Local 2880* case presented witnesses at his trial by the union and did not take an appeal according to the union procedures. Brief for Petitioners, pp. 73-4, *Local No. 2880, Lumber & Sawmill Workers v. NLRB*, 158 F.2d 365 (C. C. A. 9th 1946). In the *White Cross* case, the individual involved was suspended, rather than discharged, pending her trial by the union; she apparently resorted directly to the Board. Brief for Petitioner, pp. 5-6, Brief for Respondent, pp. 1-3, *NLRB v. American White Cross Laboratories*, 160 F.2d 75 (C. C. A. 2d 1947). In the *Aluminum Co.* case, the expellee did claim unfair union procedure, but this issue was apparently decided against him in arbitration. Brief for Petitioner, pp. 4-5, Brief for Respondent, pp. 9-10, *Aluminum Company of America v. NLRB*, 159 F.2d 523 (C. C. A. 7th 1946).

30. *Ray v. Brotherhood of R.R. Trainmen*, 182 Wash. 39, 44 P.2d 787 (1935) held that an expulsion was unjustified for merely voting for a rival union at an election under

process clause to certified bargaining agents for violations of substantive rights.<sup>31</sup> But some recent decisions have denied recovery,<sup>32</sup> and relief in a given case is uncertain. And even if legal success were likely the remedy seems insufficient; the average worker does not have the funds necessary for legal action, and the judicial award is too long delayed for his needs.<sup>33</sup>

Present Board policy then, however circuitous, makes recovery more cer-

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the Railway Labor Act. The majority implied that more active support might have changed its decision, *id.* at 46, 48, 53, 44 P.2d at 790-3; the dissenting judge thought the union justified in disciplining the member, *id.* at 54, 44 P.2d at 793. *Abdon v. Wallace*, 95 Ind. App. 604, 165 N.E. 68 (1929) allowed recovery for an expulsion based on testimony under subpoena at an ICC hearing. *Compare* *Spayd v. Ringling Rock Lodge*, 270 Pa. 67, 113 Atl. 70 (1921) (signing petition to state legislature in opposition to union stand); *St. Louis S. W. Ry. v. Thompson*, 102 Tex. 89, 113 S. W. 144 (1908) (testimony in court); *Schneider v. Local 60, United Ass'n Journeymen Plumbers*, 116 La. 270, 40 So. 700 (1906) (voting contrary to union's instruction in capacity of city plumbing inspector); *Morgan v. Local 1150, United Electrical Workers*, 16 LAB. REL. REP. 720 (Ill. Sup. Ct. 1945) (expulsion for political views in 1944 Presidential campaign). *But see, e.g., Elfer v. Marine Engineers Beneficial Ass'n*, 179 La. 383, 154 So. 32 (1934) (circulating anti-administration leaflet in union election campaign valid grounds for expulsion), and cases cited note 32 *infra*.

31. *Betts v. Easley*, 161 Kan. 459, 169 P.2d 831 (1946), 56 YALE L. J. 731 (1947); *cf. Steele v. Louisville & N. R.R.*, 323 U. S. 192, 202, and Mr. Justice Murphy concurring at 208-9 (1944); *James v. Marinship Corp.*, 25 Cal.2d 721, 731, 155 P.2d 329, 335 (1944). See *Summers, supra* note 1, at 56-8.

32. Relief was denied on the ground that the union was justified in the substantive basis of its action in suspension or expulsion of members in: *Ames v. Dubinsky*, 20 LAB. REL. REP. (Labor-Management) 2021 (N.Y. Sup. Ct. 1947) (union may decide factual question of fair comment in internal affairs); *De Mille v. Am. Fed. of Radio Artists*, 15 LAB. REL. REP. 910 (Cal. Sup. Ct. 1945) (non-payment of special legislative assessment); *Shein v. Rose*, 12 N.Y.S.2d 87 (Sup. Ct. 1939) (political affiliation).

Adherence to acceptable procedures by the union was the basis in denying members redress in: *Glauber v. Patoff*, 294 N. Y. 583, 63 N. E.2d 181 (1945) (must prove bad faith on the part of membership as a whole to recover damages); *accord, Browne v. Hibbets*, 290 N. Y. 459, 49 N. E.2d 713 (1943); *Janow v. Grad*, 16 N. Y. S.2d 118 (Sup. Ct. 1939) (violation of local's procedures irrelevant if procedures of parent union have been observed); *Strobel v. Irving*, 171 Misc. 965, 14 N.Y.S.2d 864 (N.Y. City Cts. 1939) (if member pleads guilty at union trial, court will not review union's action, even if in fact member committed no offense).

The freedom of unions to exclude whomever they wish from membership for economic motives was upheld in: *Walter v. McCarvel*, 309 Mass. 260, 34 N. E.2d 677 (1941); *Boro Park Sanitary Mkt. v. Heller*, 280 N. Y. 481, 487, 21 N. E.2d 687, 688-9 (1939); *Acierio v. North Shore Bus Co.*, 173 Misc. 79, 17 N. Y. S.2d 170 (Sup. Ct. 1939); *Murphy v. Higgins*, 12 N. Y. S.2d 913 (Sup. Ct. 1939), *aff'd*, 260 App. Div. 854, 23 N. Y. S.2d 552 (1st Dep't 1940); *cf. Kanzler v. Linoleum, Carpet & Soft Tile Workers*, 20 Wash.2d 718, 149 P.2d 276 (1944).

33. See *Summers, supra* note 1 at 62-3, for one example. Others are *Polin v. Kaplan*, 257 N. Y. 277, 177 N. E. 833 (1931) (recovery for loss of wages allowed, but not recovery of attorney's fee); and *Browne v. Hibbets, supra* note 32 (reinstatement to membership ordered, but no damages for loss of employment).

tain and does not drain finances of the individual worker;<sup>34</sup> but its deficiencies and ramifications should not be overlooked. The employer may frequently be placed in a dilemma when an employee, about to be discharged at union request, alleges the expulsion to be for support of a rival union during the "appropriate time." There is no assurance that advice from the Board is readily available;<sup>35</sup> whether the employer discharges or refuses to do so, he faces the possibility that the Board may subsequently decide differently from him the reason for the exclusion or expulsion, and thereby find him guilty of an unfair practice in discriminating against either the rival or the incumbent union.<sup>36</sup> Moreover, if he fails to discharge he runs the risk of a strike.<sup>37</sup> Unions too derive no pleasure from the policy. Their fear centers in the possible spread of Board surveillance over internal union affairs;<sup>38</sup> unions can well view with

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34. The Board rather than the individual is the protagonist in the complaint and may obtain court enforcement of its order, § 10 (b) (e) of the Act.

35. There must be a formal hearing before a binding order can issue, [§ 10 (b)] which the Board itself may review, [§ 10 (c)]. The relevance of appropriations currently being cut in Congress to the ability of the Board to get investigators on the spot immediately is obvious.

While there can be no binding determination, there may be swift notice to the employer from the Board that the discharge *may* be deemed an unfair practice. The Wallace Corporation, for example, was so informed "immediately after" it made the discharges. *Wallace Corp. v. NLRB*, 323 U. S. 248, 257 (1944).

36. If he investigates the causes of the discharge, he may be accused of interference by the incumbent union, and face a charge of violating §§ 8(1) (2). If he does not discharge the individual, this may be taken by the Board as an indication of employer preference for the rival union, which might be a similar violation. If he does not investigate and does discharge, the instant Board policy may be applied, and a violation of § 8 (3) found in discrimination against the rival union.

37. The Act guarantees the right to strike, § 13, and there has been no question of that right where the employer is committing an unfair practice, as he would be if the Board were finally to agree with the incumbent union's position. On the other hand, if there is no unfair practice, the Board has recently strengthened a previously indicated policy of not ordering reinstatement of the strikers. *Thompson Products, Inc.*, 72 N. L. R. B. No. 150 (Feb. 21, 1947); *American News Co.*, 55 N. L. R. B. 1302 (1944). *but cf.* *Columbia Pictures Corp.*, 64 N. L. R. B. 490 (1945). Despite *NLRB v. Indiana Desk Co.*, 149 F.2d 987 (C. C. A. 7th 1945) denying right to strike in effect against wartime wage controls, it is questionable whether the Court would today uphold this Board limitation on the right to strike. *Southern S.S. Co. v. NLRB*, 316 U. S. 31 (1942), which disallowed reinstatement for strikers who were found to be violating a mutiny statute, was a 5-4 decision; the three Justices who have since left the Court were all with the majority; *cf.* *NLRB v. Fansteel Metallurgical Corp.*, 305 U. S. 240 (1939); *NLRB v. Sands Mfg. Co.*, 306 U. S. 332 (1939); in both of which the only Justices still members of the Court, Black and Reed, were in dissent. See Note, 59 *HARV. L. REV.* 747 (1946).

38. It must be emphasized that the Act is not directed against union practices. The only definition of illegal acts is contained in § 8, "It shall be an unfair labor practice for an employer . . ." (emphasis added). On the other hand, the Board's investigatory powers, § 11, are granted without qualification, and clearly extend to union affairs, for there could otherwise be no decisions relating to company domination or proper bargain-

trepidation extensions of jurisdiction by a Labor Board creating from its own statutory interpretation a power unchecked by specific legislative limitation. Finally, the limited scope of the policy provides no complete protection to individual workers, since a discharge is obviously a prerequisite to the inception of Board action.<sup>39</sup>

These defects are basic to the policy and their correction can come only through Congressional action aimed at the union, rather than the employer. Such action, however, should not abrogate Board jurisdiction; it would be unwise for Congress to rely on the courts to administer, for example, a statute listing union practices which are against public policy. Union evasive practices<sup>40</sup> and unwarranted charges of statutory violations would tax the judiciary with what is essentially a subtle fact-finding problem. The task is administrative<sup>41</sup> and a Labor Board already exists. If the legislation were to grant the Board jurisdiction over specified union practices with power to issue reinstatement orders to both union and employer,<sup>42</sup> employers would be relieved of the responsibility of caring for a public interest, and unions, were the statute sufficiently specific, would be forewarned. And if, as under pres-

ing unit. Furthermore, the Board has threatened to revoke certifications for racial discrimination, *Larus & Bros. Co.*, 62 N. L. R. B. 1075 (1945) and cases there cited, or for discrimination because of prior union activity, *R.K.O. Radio Pictures, Inc.*, 61 N. L. R. B. 112, 116 (1945). It has even been suggested that closed-shop unions qualify as "employers" under the Act, so that Board orders may be addressed directly to them, since they have "the right to control effectively the tenure of employment." See Board Member Reynolds dissenting in *Lewis Meier & Co.*, 72 N. L. R. B. No. 106 (April 24, 1947).

39. See *Ames v. Dubinsky*, 20 LAB. REL. REP. (Labor-Management) 2021 (N.Y. Sup. Ct. 1947), where the members were granted work cards, defeating the jurisdiction of the Board, but were suspended from union membership, effacing their participation in union decision-making; the offense was circulation of statements "detrimental to the interests" of the union and its officers during the organization's election campaign. See Witmer, *supra* note 28.

40. The union may either make it as difficult as possible for the Board to unearth its true motive, for example by assigning many other reasons for its action; or it may not expel the offensive member, but may impose fines or tasks not quite onerous enough to justify his deciding to go through the ordeal of defiance, expulsion, discharge, and Board procedures to reinstatement.

41. The opinion of Congress as to the proper forum for labor fact-finding—administrative agency or courts—was made clear in the Wagner Act by the establishment of a new independent agency, §3. The Court has indicated it shares this opinion. See, e.g., *Switchmen's Union v. Nat'l Mediation Board*, 320 U. S. 297 (1943) (decision of Board on proper unit is not reviewable); *NLRB v. Hearst Publications*, 322 U. S. 111, 130-1 (1944) [because of "experience" of Board, and its "familiarity" with labor problems its determinations are "to be accepted . . . if . . . (they have) 'warrant in the record' and a reasonable basis in law."]

42. Refusal or revocation of certification as a weapon seems unjustifiable. In some cases it would have little effect since the union's majority is so clear certification is no boon; in others it would punish far beyond the need, and deprive workers of any union representation.

ent policy, Board jurisdiction were immediately invokable after expulsion, the delay and possible expense of intra-union appeal would be avoided. Finally, the instant issue, now necessarily treated as distinct, would fall into its rightful place as but one of many in the general problem of union democracy.

## SEGREGATION IN PUBLIC SCHOOLS—A VIOLATION OF "EQUAL PROTECTION OF THE LAWS"\*

THE doctrine that "separate but equal facilities" is not a violation of the "equal protection of the laws" clause of the Fourteenth Amendment<sup>1</sup> was clearly enunciated in 1896 in *Plessy v. Ferguson*.<sup>2</sup> The Supreme Court, proceeding on the assumption that compulsory segregation did "not necessarily imply the inferiority of either race to the other,"<sup>3</sup> held a law requiring separation on public carriers constitutional.<sup>4</sup>

The rationale of that decision has been subsequently used by state courts to justify segregation in the public schools,<sup>5</sup> and the Supreme Court, without squarely meeting the question of constitutionality,<sup>6</sup> has implied its approval. It has held that school boards will not be restrained from using public funds for the establishment of white high schools while none exist for colored children;<sup>7</sup> that a Chinese child is not deprived of the equal protection of the laws if registered in a colored school;<sup>8</sup> that colleges incorporated under state laws may be penalized as corporations for not abiding by state segregation statutes;<sup>9</sup> and that a State University must admit colored students for the study

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\* *Westminster v. Mendez* (C. C. A. 9th April 14, 1947), affirming *Mendez v. Westminster School Dist.*, 64 F. Supp. 544 (S. D. Cal. 1946).

1. U.S. CONST. AMEND. XIV, § 1. For a detailed history of the Amendment see, FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908).

2. 163 U.S. 537 (1896).

3. *Id.* at 544. "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.* at 551.

4. See vigorous dissent of Mr. Justice Harlan, *id.* at 552.

5. See notes 41-3 *infra*.

6. Waite, *The Negro in the Supreme Court*, 30 MINN. L. REV. 219 (1946).

7. *Cummings v. Board of Ed.*, 175 U.S. 528 (1899). "It was said at the argument that the vice in the common school system of Georgia was the requirement that the white and colored children of the State be educated in separate schools. *But we need not consider that question in this case.*" *Id.* at 543. (Italics added.)

8. *Gong Lum v. Rice*, 275 U.S. 78 (1927). Taft, C. J., refused to discuss the constitutionality of educational segregation considering the matter closed by decisions in the *Cummings* and *Plessy* cases.

9. *Berea College v. Kentucky*, 211 U.S. 45 (1908). "The statute is clearly separable and may be valid as to one class while invalid as to another. *Even if it were conceded that*

of law where no other provision has been made for the legal education of Negroes.<sup>10</sup>

However, a recent District Court decision,<sup>11</sup> affirmed by the Ninth Circuit Court of Appeals, has questioned the basic assumption of the *Plessy* case and may portend a complete reversal of the doctrine.<sup>12</sup> In affirming an injunction against the arbitrary assignment of children of Mexican ancestry to separate schools, the Circuit Court chose to avoid the constitutional issue and relied solely on the violation of a California statute which restricted segregation,<sup>13</sup> whereas the lower court had based its decision on both the statute and the "equal protection" clause.<sup>14</sup> Although the facilities of the Mexican schools were admittedly equal to those of other district schools, the District Court felt that it was not enough to provide the same text books and courses of instruction that were available to other public school children. "A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage."<sup>15</sup>

Modern sociological and psychological studies lend much support to the District Court's views. A dual school system, even if "equal facilities" were ever in fact provided, does imply social inferiority.<sup>16</sup> There is no question

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*its assertion of power over individuals cannot be sustained, still it must be upheld so far as it restrains corporations."* *Id.* at 54. (Italics added.) See 82 U. OF PA. L. REV. 157 (1933).

10. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). The issue of segregation was not before the Court and was not discussed. For final outcome see *Missouri ex rel. Gaines v. Canada*, 344 Mo. 1238, 131 S.W.2d 217 (1939).

11. *Mendez v. Westminster School Dist.*, 64 F. Supp. 544 (S.D. Cal. 1946), 30 MINN. L. REV. 646, 47 COL. L. REV. 325 (1947).

12. *Westminster v. Mendez* (C.C.A. 9th April 14, 1947). No petition for certiorari had been filed by the school district as this went to press, although a petition is planned. Communication to YALE LAW JOURNAL from Joel E. Ogle, county counsel Santa Ana County. Whether certiorari is granted or not, there are cases presently pending in Oklahoma, Texas, Louisiana and South Carolina which involve state educational segregation statutes which may require a Supreme Court ruling in the near future on the constitutional issue of the *Mendez* case. Communication to YALE LAW JOURNAL from Robert L. Carter, Ass't Special Counsel National Association for the Advancement of Colored People.

13. CAL. ED. CODE §§ 16004-5 (Deering, 1944). Since the decision in this case a law outlawing educational segregation of children of Indian, Chinese and Japanese extraction has been enacted in California. The Pittsburgh Courier, June 28, 1947, p. 12, col. 2.

14. The District Court rejected the contention that such schools were necessary to cope with the language handicap of Spanish-speaking children. It emphasized that the language tests given were superficial and unreliable and that in some instances the sole criterion for separate classification was the Mexican name of the child. *Mendez v. Westminster School Dist.*, 64 F. Supp. 544, 550 (S.D. Cal. 1946). "Actually, many other factors having slight connection with a command of English enter in. Apparent prosperity, cleanliness, the aggressiveness of parents, and the quota of Mexican-Americans already in the mixed school are factors." TUCK, NOT WITH THE FIST 185-6 (1946).

15. *Mendez v. Westminster School Dist.*, 64 F. Supp. 544, 549 (S.D. Cal. 1946).

16. BOND, EDUCATION OF THE NEGRO IN THE AMERICAN SOCIAL ORDER 385 (1934);



under such circumstances as to which school has the greater social prestige. Every authority on psychology and sociology is agreed that the students subjected to discrimination and segregation are profoundly affected by this experience. Though it has been argued that to force the abolition of educational segregation would create problems of adjustment more injurious to the personalities of children than are presently engendered in separate schools,<sup>17</sup> the prevailing view indicates the advisability of unified school associations.<sup>18</sup> Experience with segregation of Negroes has shown that adjustments may take the form of acceptance, avoidance, direct hostility and aggression, and indirect or deflected hostility.<sup>19</sup> In seeking self-expression and finding it blocked by the practices of a society accepting segregation, the child may express hatred or rage<sup>20</sup> which in turn may result in a distortion of normal

MOTON, WHAT THE NEGRO THINKS 99 (1929); Bunche, *Education in Black and White*, 5 J. OF NEGRO ED. 351 (1936). See also, GALLAGHER, AMERICAN CASTE AND THE NEGRO COLLEGE 184 (1938); MYRDAL, AN AMERICAN DILEMMA 54-5, 97-101, 577-8, 1315-7 n. 32 (1944); Kilpatrick, *Resort to Courts by Negroes to Improve Their Schools a Conditional Alternative*, 4 J. OF NEGRO ED. 412, 415 (1935). See generally, DAVIS AND DOLLARD, CHILDREN OF BONDAGE (1940); DOLLARD, CASTE AND CLASS IN A SOUTHERN TOWN (1937); WOOFER, THE BASIS OF RACIAL ADJUSTMENT (1925). The failure of a statute expressly to declare a legal inferiority does not prevent the courts' scrutiny of the apparent classification to determine the real intent of the law. See *Bailey v. Alabama*, 219 U.S. 219, 244 (1911); *Dobbins v. Los Angeles*, 195 U.S. 223, 240 (1904); Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 24 (1936).

17. PROSSER, NON-ACADEMIC DEVELOPMENT OF NEGRO CHILDREN IN MIXED AND SEGREGATED SCHOOLS (1933) (Unpublished Doctor's Dissertation cited in Thompson, *Court Action the Only Reasonable Alternative to Remedy Immediate Abuses of the Negro Separate School*, 4 J. OF NEGRO ED. 419, at 430 [1935]). Criticized, *id.* at 430 *et seq.* "... the result of the experiment (mixed schools) may be complete ruin of character, gift, and ability and ingrained hatred of schools and men. . . . We shall get a finer, better balance of spirit; an infinitely more capable and rounded personality by putting children in schools where they are wanted, and where they are happy and inspired, than in thrusting them into hells where they are ridiculed and hated." Du Bois, *Does the Negro Need Separate Schools?*, 4 J. OF NEGRO ED. 328, 331 (1935). This assertion is qualified *id.* at 335. "Other things being equal, the mixed school is the broader, more natural basis for the education of all youth. It gives wider contacts; it inspires greater self-confidence; and suppresses the inferiority complex. But other things seldom are equal, and in that case, Sympathy, Knowledge, and the Truth, outweigh all that the mixed school can offer."

18. BOND, *op. cit. supra* note 16, at 13. "However, all social psychology teaches that early contact with members of diverse racial groups is more conducive toward interracial amiability than total separation up to adulthood." *Id.* at 385.

Referring specifically to the educational practices condemned in the instant case, Miss Tuck asserts as one of the effects of segregation "... the one-sided development, the ignorance of life outside one's own group, which results from segregation." Tuck, *op. cit. supra* note 14, at 187. See also, FOREMAN, ENVIRONMENTAL FACTORS IN NEGRO ELEMENTARY EDUCATION (1932); GALLAGHER, *op. cit. supra* note 16, at 321-2; KLINEBERG, RACE DIFFERENCES 345-7 (1935); MOTON, *op. cit. supra* note 16, at 99; YOUNG, AMERICAN MINORITY PEOPLES 495 (1932).

19. JOHNSON, PATTERNS OF NEGRO SEGREGATION 244-324 (1943).

20. See HEINRICH, THE PSYCHOLOGY OF A SUPPRESSED PEOPLE 52 (1937); DOLLARD, *op. cit. supra* note 16, at 269, 441; YOUNG, *op. cit. supra* note 18, at 585.

social behavior by the creation of the defense mechanism of secrecy.<sup>21</sup> The effects of a dual school system force a sense of limitations upon the child<sup>22</sup> and destroy incentives,<sup>23</sup> produce a sense of inferiority,<sup>24</sup> give rise to mechanisms of escape in fantasy<sup>25</sup> and discourage racial self-appreciation.<sup>26</sup> These abnormal results, condoned by the implications of the *Plessy* case, deny to the Negro and Mexican child "equal protection of the laws" in every meaningful sense of the words.

Experience in states in which segregation is compulsory and of long standing,<sup>27</sup> moreover, indicates that "equality" of facilities does not, in fact, coexist with segregation. In 1939-40 the average expense in nine Southern states for a white pupil was almost 212% greater than the average expense per Negro pupil, and, in Mississippi 606.6% greater.<sup>28</sup> Seventeen states and the District of Columbia showed for the year 1941-2 a ratio of 36.1 Negro pupils to one

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21. HEINRICH, *op. cit. supra* note 20, at 20; MORON, *op. cit. supra* note 16, at 12-3. Other methods used by Negroes in the process of accommodation to the fact of segregation are aggression against whites or other Negroes, giving up the competition for white caste values and accepting other forms of gratification, or competing for the values of white society thereby raising their own class position. They may manage aggression partly by expressing dominance within their own group and partly by suppression of the impulse as individuals. DOLLARD, *op. cit. supra* note 16, at 253.

22. The child is reminded of his position in all situations whether at home, in school, at the theater, or in the street. He soon discovers that he is not allowed to compete on equal terms with others. Long, *Some Psychogenic Hazards of Segregated Education of Negroes*, 4 J. OF NEGRO ED. 336, 343 (1935).

23. Recognizing at an early age that he must live with limited choice and opportunity regardless of ability, the ambition of the child is diverted into compensatory channels. Mediocrity is accepted as the standard as a result of the absence of adequate social stimulus. *Ibid.* See also, Long, *The Intelligence of Colored Elementary Pupils in Washington, D. C.* in 3 J. OF NEGRO ED. 205-22 (1934) (lack of incentive results in depressed intelligent quotients); GALLAGHER, *op. cit. supra* note 16, at 107 (the apparent laziness or shiftlessness of the Negro is in reality the defeatism and resignation beaten into him by society during the formative years of his growth).

24. See Long, *op. cit. supra* note 22, at 343 *et seq.*; HEINRICH, *op. cit. supra* note 20, at 57-61; MYRDAL, *op. cit. supra* note 16, at 758.

25. In a mild form this is quite normal. However, bafflement may lead the individual to take flight in unreality in order to escape a world of adversity. For a discussion of the various manifestations of this escape mechanism see Long, *op. cit. supra* note 22, at 345 *et seq.* and authorities cited therein. See also, GALLAGHER, *op. cit. supra* note 16, at 109; SUTHERLAND, COLOR, CLASS, AND PERSONALITY 42-59 (1942).

26. POWDERMAKER, AFTER FREEDOM 325-7 (1939); Long, *op. cit. supra* note 22, at 349. *Contra*: JOHNSON, *op. cit. supra* note 19, at 320; PARK AND BURGESS, INTRODUCTION TO THE SCIENCE OF SOCIOLOGY 628-9 (1924).

27. Ala., Ark., Del., D.C., Fla., Ga., Ky., La., Md., Miss., Mo., N.C., Okla., S.C., Tenn., Texas, Va., and W. Va. Twelve of these states have constitutional provisions as well as statutes requiring segregation. For typical constitutional and statutory provisions see ALA. CONST. ART. XIV, § 256, ALA. CODE, tit. 52, § 93, (1940).

28. Blose and Caliver, *Statistics of the Education of Negroes: A Decade of Progress* 6, Table 8 (1944), cited in Brief for N.A.A.C.P. as *Amicus Curiae*, p. 12, *Westminster v. Mendez* (C.C.A. 9th, April 14, 1947).

teacher while the ratio for whites was 28.6 to one.<sup>29</sup> The average length of the school term in 1943-4 in these states was 173.5 days for whites, but only 164.0 days for Negroes.<sup>30</sup> The average annual salary for a white teacher in fifteen Southern states and the District of Columbia was \$1,349 while the average Negro teacher's salary was \$895.<sup>31</sup> There is a scarcity of properly trained Negro teachers<sup>32</sup> and a lack of teaching equipment in the colored schools.<sup>33</sup> One reason for the failure to provide "equal facilities" for a segregated school system is the difficulty of securing adequate funds for its maintenance. The necessity for increasing the tax burden to maintain dual school and transportation facilities of equal caliber would impoverish many financially insecure communities.<sup>34</sup>

The effects upon society of segregation and of the correlative inequality of facilities have become increasingly clear. In the critical period of June-July 1943, when the need for manpower was urgent, 34.5% of the Negroes and only 8% of the whites rejected for military service failed to meet the minimum educational standards.<sup>35</sup> In the professions, where the needs for Negro

29. Bloise and Alves, *Statistics of State School Systems, 1939-40 and 1941-42*, U.S. OFFICE OF ED., BIENNIAL SURVEY OF EDUCATION IN THE UNITED STATES 37, Table XXI (1944). The pupil teacher ratio in 1944 for the thirty-one States not requiring separate schools for Negroes was 27.5. Bloise and Foster, *Statistics of State School Systems, 1943-44*, U.S. OFFICE OF ED., BIENNIAL SURVEY OF EDUCATION IN THE UNITED STATES 1942-1944, 13 (1946).

30. Bloise and Foster, *id.* at 71, Table 34. Mississippi had the shortest school term for both whites and Negroes, 165.5 days for whites and 130.0 days for Negroes. *Ibid.* In Illinois the length of the school term was 186.8 days. *Id.* at 45, Table 19. The average number of days attended by each white pupil enrolled in the southern states was 145.0 and by each Negro, 133.4 days. The percentage of white pupils in daily attendance was 83.6% compared with 81.4% for Negroes. *Id.* at 71, Table 34.

31. *Ibid.* (Only fifteen States reported annual salaries). The figures for Mississippi show the annual salary for whites to have been \$1,107 and only \$342 for Negroes.

32. BOND, *op. cit. supra* note 16, at 267-70, 277-83. See also SCHRIEKE, *ALIEN AMERICANS* 160-1 (1936) (low standards prevail in many colored schools).

33. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 229 (1946); MANGUM, *THE LEGAL STATUS OF THE NEGRO* (1940), 129-30; MOTON, *op. cit. supra* note 16, at 101; MYRDAL, *op. cit. supra* note 16, at 902-7; SCHRIEKE, *op. cit. supra* note 32, at 161, 166-9; Hubbard and Alexander, *Types of Potentially Favorable Court Cases Relative to the Separate School*, 4 J. OF NEGRO ED. 375, 377 (1935); Harris and Spero, *Negro Problem* in 11 ENCYC. SOC. SCI. 335, 352 (1933); Horne, "Dog House" Education, 5 J. OF NEGRO ED. 359 *et seq.* (1936); Comment, 13 So. CALIF. L. REV. 68 (1939).

34. BOND, *op. cit. supra* note 16, at 231; JOHNSON, *op. cit. supra* note 19, at 17, 321; MANGUM, *op. cit. supra* note 33, at 132; MYRDAL, *op. cit. supra* note 16, at 337-44; STYLES, *NEGROES AND THE LAW* 91 (1937); "Far from being an extra burden, the dual system . . . as it operates today is an actual means of saving rather large sums of money because only the first half of the 'separate but equal' clause tends to be enforced." GALLAGHER, *op. cit. supra* note 16, at 119. See also Wirth, *The Price of Prejudice*, Survey Graphic, Jan., 1947, pp. 19-21.

35. MONTGOMERY, ALA., AMER. TEACHERS ASS'N, *THE BLACK AND WHITE OF REJECTIONS FOR MILITARY SERVICE* 5 (1944), cited in Brief for N.A.A.C.P. *supra* note 28, at 17.

personnel continue unsatisfied, the 1940 ratio of white physicians to white citizens was one to 735 while the ratio for Negroes was one to 3651.<sup>36</sup> One lawyer served 670 whites but there was only one lawyer for 12,230 Negroes.<sup>37</sup> One dentist served 1,752 whites whereas there was only one dentist for 8,800 Negroes.<sup>38</sup> In the seventeen states officially practicing segregation, professional education for Negroes is virtually non-existent.<sup>39</sup> It is impossible to state the precise effect of educational segregation on the lack of qualified professional personnel since the educational system is, in a sense, a reflection of the caste society in which it functions. Its role, however, in perpetuating the existing social inequality makes it a causative factor of great importance.<sup>40</sup>

State courts have been slow to apply these facts to problems of segrega-

36. In 1940, there were 160,845 white and 3,524 Negro physicians and surgeons in the United States. In proportion to population these represented one physician to the following number of the white and Negro population, respectively:

Section	White	Negro
U.S. ....	735	3,651
North .....	695	1,800*
South .....	859	5,300*
West .....	717	2,000*
Miss. ....	4,294	20,000*

\* To the nearest hundred or thousand.

Thompson, *Some Critical Aspects of the Problem of the Higher and Professional Education for Negroes* in 14 J. OF NEGRO ED. 509, 511-2 (1945).

37.	Section	White	Negro
	U.S. ....	670	12,230
	North .....	649	4,000*
	South .....	711	30,000*
	West .....	699	4,000*
	Miss. ....	4,234	358,000*

\* To the nearest hundred or thousand.

Thompson, *id.* at 512.

38.	Section	White	Negro
	U.S. ....	1,752	8,800*
	North .....	1,555	3,900*
	South .....	2,790	14,000*
	West .....	1,475	3,900*
	Miss. ....	14,190	37,000*

\* To the nearest hundred or thousand.

Thompson, *id.* at 512.

39. *Id.* at 514-5.

40. "(the school) has been the product and interpreter of the existing system, sustaining and being sustained by the social complex." BOND, *op. cit. supra* note 16, at 13; GALLAGHER, *op. cit. supra* note 16, at 185; Bunche, *op. cit. supra* note 16, at 351. For a discussion of this point see the excellent work of the late Prof. Alexander Pekelis in the Brief for Am. Jewish Cong. as *Amicus Curiae*, p. 14, *Westminster v. Mendez* (C.C.A. 9th April 14, 1947); Henningburg, *What Shall We Challenge in the Existing Order?* in 5 J. OF NEGRO ED. 383, 386-7 (1936).

tion.<sup>41</sup> They have, in the main, adhered to the "separate but equal facilities" doctrine in accepting the constitutionality of segregation,<sup>42</sup> although they have tended to insist upon a stricter enforcement of "equal facilities."<sup>43</sup> Some courts have invalidated such practices, but only on the basis of their own statutes.<sup>44</sup>

Contrastingly, the Supreme Court has generally considered racial classifications and distinctions on a governmental level, contrary to the Fourteenth Amendment.<sup>45</sup> Only with regard to common carriers<sup>46</sup> and to wartime measures adopted against persons of Japanese extraction,<sup>47</sup> has the Court directly upheld such classification. Residential segregation set up by state legislation

41. See *State ex rel. Weaver v. Ohio State University*, 126 Ohio St. 290, 185 N.E. 196 (1933) (colored girl not admitted to residence with white girls in Home Economics Course); *Dameron v. Bayless*, 14 Ariz. 180, 126 Pac. 273 (1912) (distance to a Negro school is not a factor in determining "equality"); *Reynolds v. Board of Ed.*, 66 Kan. 672, 72 Pac. 274 (1903) (larger building for white students did not make for unequal facilities).

42. *Roberts v. Boston*, 5 Cush. 198 (Mass. 1849) (it is not unreasonable to require Negro pupils to walk 1/5 of a mile further to a Negro school than white pupils have to walk); *Wright v. Board of Ed.*, 129 Kan. 852, 284 Pac. 363 (1930) (forcing a Negro child to walk twenty blocks is not unreasonable); *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405 (1874); *Cory v. Cartier*, 48 Ind. 327 (1874); *Lechew v. Brummell*, 103 Mo. 546, 15 S.W. 765 (1890); *People ex rel. King v. Gallagher*, 93 N.Y. 438, 45 Am. Rep. 232 (1883); *State ex rel. Garnes v. McCann*, 21 Ohio St. 198 (1871); *State ex rel. Michael v. Witham*, 179 Tenn. 250, 165 S.W. 2d 378 (1942); *Sweatt v. Painter*, Ct. of Travis County, Texas, No. 74,945 (1946), 4 NAT'L B.J. 365.

43. *Piper v. Big Pine School Dist.*, 193 Cal. 664, 226 Pac. 926 (1924); *Jones v. Newlon*, 81 Colo. 25, 253 Pac. 386 (1927); *Graham v. Board of Ed.*, 153 Kan. 840, 114 P. 2d 313 (1941); *Patterson v. Board of Ed.*, 11 N.J. Misc. 179, 164 Atl. 892 (Sup. Ct. 1933) *aff'd* 112 N.J.L. 99, 169 Atl. 690 (Ct. Err. & App., 1934). See also *Jones v. Board of Ed.*, 90 Okla. 233, 217 Pac. 400 (1923) (accommodations sufficient to allow some students to attend school only part time are a violation of the state constitution); *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590 (1936); *Williams v. Board of Ed.*, 79 Kan. 202, 99 Pac. 216 (1908). See 45 YALE L. J. 1296 (1936), 20 MINN. L. REV. 673 (1936). See Note, 103 A.L.R. 713 (1938).

44. *Jones v. Newlon*, 81 Colo. 25, 253 Pac. 386 (1927); *Clark v. Board of Directors*, 24 Iowa 266 (1868); *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590 (1936); *People ex rel. Workman v. Board of Ed.*, 18 Mich. 400 (1869); *Jones v. Board of Ed.*, 90 Okla. 233, 217 Pac. 400 (1923); *Kaine v. Commonwealth ex rel. Manaway*, 101 Pa. St. 490 (1882).

45. *Hill v. Texas*, 316 U.S. 400 (1942); *Pierre v. Louisiana*, 306 U.S. 354 (1939); *Nixon v. Condon*, 286 U.S. 73 (1932); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Truax v. Raich*, 239 U.S. 33 (1915); *Neal v. Delaware*, 103 U.S. 370 (1881); *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Yick Wo. v. Hopkins*, 118 U.S. 356 (1886); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). The Court has also denied certiorari in *Alston v. Norfolk School Board*, 112 F. 2d 992 (C.C.A. 4th 1940), *cert. denied* 311 U.S. 693 (1940).

46. *Plessy v. Ferguson*, 163 U.S. 537 (1896). The Court has weakened the position of the *Plessy* case by holding a state statute, requiring separation of races on carriers in interstate commerce, unconstitutional. *Morgan v. Virginia*, 328 U.S. 373 (1946).

47. *Hirabayashi v. U.S.*, 320 U.S. 81 (1943); *Ex parte Endo*, 323 U.S. 283 (1944); *Korematsu v. U.S.*, 323 U.S. 214 (1944). See Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L. J. 489 (1945); Comment, 56 YALE L. J. 1017 (1947).

or municipal ordinances has been invalidated<sup>48</sup> and even restriction by private agreement can no longer be considered invulnerable.<sup>49</sup>

The only barrier to a flat holding that segregation is a denial of "equal protection of the laws" is, in the last analysis, the *Plessy* case. However, the basic assumption of the Court in that case, that compulsory segregation does not imply social inferiority, has become untenable in the light of our present knowledge of psychology and sociology.<sup>50</sup> It becomes apparent then, that the conclusion of the court followed from the inaccuracy of its assumptions. Consequently, having clearly implied that if discrimination were based upon social inferiority it would be constitutionally unacceptable,<sup>51</sup> the rationale of the *Plessy* case becomes authority for the doctrine that segregation *per se* is a denial of the protection afforded by the Fourteenth Amendment.

There is little doubt that the Supreme Court will be presented with a case

48. *Harmon v. Tyler*, 273 U.S. 668 (1927), 36 YALE L. J. 274 (1926) (note on State Court decision); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Richmond v. Deans*, 37 F. 2d 712 (C.C.A. 4th 1930), *aff'd* 281 U.S. 704 (1930). Other courts have followed this same point of view. *In re Lee Sing*, 43 Fed. 359 (C.C.N.D. Cal. 1890) (San Francisco ordinance requiring Chinese to move to a certain part of the city is void as a violation of the Fourteenth Amendment and a treaty with China); *State v. Gurry*, 121 Md. 534, 88 Atl. 228 (1913) (municipality has no authority to enact segregation ordinance prohibiting owner of property from using it because of his color); *Clinard v. Winston-Salem*, 217 N.C. 119, 6 S.E. 2d 867 (1940); *State v. Darnell*, 166 N.C. 300, 81 S.E. 338 (1914).

49. The Supreme Court has permitted anti-Negro restrictive covenants on the theory that the Fourteenth Amendment prohibited action by the State not by individuals. *Corrigan v. Buckley*, 271 U.S. 323 (1926). This supported decisions rendered by several State tribunals. See, e.g., *Los Angeles Inv. Co. v. Gary*, 181 Cal. 680, 186 Pac. 596 (1919); *Porter v. Barrett*, 233 Mich. 373, 206 N.W. 532 (1925). A contrary decision had been rendered by a California federal court. *Gandolgo v. Hartman*, 49 Fed. 181 (C.C.S.D. Cal. 1892). See also Bruce, *Racial Zoning by Private Contract in the Light of the Constitutions and the Rule Against Restraints on Alienation*, 21 ILL. L. REV. 704 (1927); 4 MINN. L. REV. 68 (1919).

But the Court has recently shown a disposition to regard as state action activities formerly considered "private". *Smith v. Allwright*, 321 U.S. 649 (1944). The use of the injunction to enforce such "private agreements" brings the state courts into the transaction and this may be sufficient to bring this action within the prohibitions of the Fourteenth Amendment. Kahen, *Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem*, 12 U. OF CHI. L. REV. 198 (1944).

In addition to the argument of the Fourteenth Amendment another attempt is now being made to invalidate racial restrictive covenants as against public policy reflected in international agreements. *In re Drummond Wren*, 4 D.L.R. 674 (Ont. Sup. Ct. 1945). See Note, *Anti-Discrimination Legislation and International Declarations As Evidence of Public Policy Against Racial Restrictive Covenants*, 13 U. OF CHI. L. REV. 477 (1946). The United States has signed the United Nations Charter and the Act of Chapultepec, both of which indicate an obligation to promote freedom for all without distinction as to race, language or religion.

50. See notes 19-26 *supra*.

51. "... every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good and not for the annoyance or oppression of a particular class." *Plessy v. Ferguson*, 163 U.S. 537, 550 (1896).

involving segregation in schools within the next year or two.<sup>52</sup> It is to be hoped that the Court will meet the issue head-on by overruling the *Plessy* case and stating broadly and unequivocally that compulsory segregation of individuals for reasons of race, religion, class or ancestry is a denial of "the equal protection of the laws." The fear that there will be friction involved in the readjustment of existing social relationships,<sup>53</sup> though entitled to substantial consideration, should not outweigh the evils of segregation. The consequences of the present rule, and of the generally complaisant acquiescence of the Supreme Court in the Negrophobia of the American south, have been to produce intense and sustained friction which has not diminished with the years.<sup>54</sup> In the process of equalizing the status of all groups in our society there is no indication that a decision in the field of education will cure the evils of minority discrimination. However, it would abolish one of the most successful elements in its perpetuation and would help provide during the formative years of intellectual growth the common associational experiences necessary to destroy prejudice.<sup>55</sup> With increased judicial vigilance against attempted evasions of the spirit of the Fourteenth Amendment,<sup>56</sup> discrimination can be checked and, it is to be hoped, eventually obliterated.

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52. Communication to YALE LAW JOURNAL from Robert L. Carter, *supra* note 12.

53. DOYLE, *THE ETIQUETTE OF RACE RELATIONS IN THE SOUTH* 168 (1937); GALLAGHER, *op. cit. supra* note 16 at 153; MANGUM, *op. cit. supra* note 16, at 136; MYRDAL, *op. cit. supra*, note 16 at 1011-15; YOUNG, *op. cit. supra* note 18, at 503; KILPATRICK, *op. cit. supra* note 16, at 413.

54. For a discussion of a more harmonious pattern of race relations in other parts of the world see FREYRE, *THE MASTERS AND THE SLAVES* (1946); SMITH, *BRAZIL, PEOPLE AND INSTITUTIONS* (1946); MACIVER, *CIVILIZATION AND GROUP RELATIONS* (1945); GREEN, *OUR LATIN AMERICAN NEIGHBORS* (1941); STONEQUIST, *THE MARGINAL MAN* (1937).

55. LASKER, *RACE ATTITUDES IN CHILDREN* 48, 197 (1929); Ware, *The Role of the Schools in Education for Racial Understanding*, 13 J. OF NEGRO ED. 421-31 (1944); FRAZIER, *NEGRO YOUTH AT THE CROSSWAYS* 290 (1940); Long, *op. cit. supra* note 22, at 343; GALLAGHER, *op. cit. supra* note 16, at 17-27; BOND, *op. cit. supra* note 16, at 385; TUCK, *op. cit. supra* note 14, at 194.

56. In a series of cases involving the right of Negroes to participate in the Democratic primary elections in Texas between 1927 and 1944, the Supreme Court voided several attempts of the Texas legislature to deny the vote to Negroes. *Nixon v. Herndon*, 273 U.S. 536 (1927) (Texas statute providing that no Negro be permitted to vote in a Democratic primary election declared unconstitutional); *Nixon v. Condon*, 286 U.S. 73 (1932) (a state statute authorizing the state executive committee of each party to prescribe qualifications of party members made the state executive committee an agent of the State; a resolution barring Negroes from the primary was declared a denial of the "equal protection of the laws" clause of the Fourteenth Amendment); *Smith v. Allwright*, 321 U.S. 649 (1944) (state convention of the Democratic party resolved that only whites were to vote in the primary; since primaries are conducted under state statutory authority the party is in effect a state agent and cannot bar Negroes from voting).

## FRIENDLY ALIEN'S RIGHT TO SUE FOR RETURN OF PROPERTY SEIZED BY ALIEN PROPERTY CUSTODIAN\*

UNDER the original provisions of the Trading With the Enemy Act, operative during World War I, the President could seize and confiscate the property of an enemy or ally of an enemy located within the United States.<sup>1</sup> Section 9(a) of the Act authorized "non-enemy" owners to sue for the return of any property which might have been erroneously seized.<sup>2</sup> At the outbreak of World War II, however, Congress amended Section 5(b) of the Act to enable the President to vest the property of all foreign nationals.<sup>3</sup> Thus friendly alien property<sup>4</sup> as well as enemy property located in this country became liable

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\* *Uberssee Finanz Korporation v. Markham*, 158 F.2d 313 (App. D.C., 1946), *cert. granted sub nom. Clark v. Uberssee Finanz Korporation*, 67 Sup. Ct. 772 (1947).

1. Section 7(c) of the Act provided that "if the President shall so require any money or other property owing or on behalf of or belonging to or held for, by, on account of, or for the benefit of an enemy or ally of enemy . . . which the president after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered or paid over to the Alien Property Custodian." 40 STAT. 418 (1917), 50 U.S.C. WAR APP. § 7(c) (1940).

2. 41 STAT. 977, 50 U.S.C. WAR APP. § 9(a) (1940) provides: "Any person not an enemy or claiming any interest, right, or title in any money or other property . . . conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him . . . may institute a suit in equity . . . in the district court of the United States . . . to establish the interest, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian . . . or the interest therein to which the court shall determine said claimant is entitled."

3. 55 STAT. 839 (1941), 50 U.S.C. WAR APP. § 616 (Supp. 1946). The amendment provides: "During the time of war or in a period of national emergency any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President . . . and . . . such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States. . . ."

Section 5(b), prior to its amendment in 1941, had provided solely for regulation, not seizure, of foreign assets. 40 STAT. 411, 50 U.S.C. WAR APP. § 5(b) (1940). Under Exec. Order No. 9193, 7 FED. REG. 5205 (1942), a foreign national is defined as anyone who is a citizen or subject of, or resident or domiciled in, a foreign country; any corporation or partnership doing business in a foreign country; or anyone who is acting on behalf of such a foreign national, corporation or partnership, or who there is reasonable cause to believe is a foreign national as so defined.

4. For the purpose of the present Note, the term alien friend will be used to refer to any foreign national who is not an enemy national within the meaning of the 1917 Act which defined enemy national as any individual, partnership or other entity of enemy nationality wherever resident, or any individual partnership, or other entity resident or doing business within enemy territory including that territory which is occupied by enemy forces. Although an American citizen could be considered as embraced within the above definition, citizens will not be considered within the term alien friend as it is used here. Thus in most cases an alien friend will be a citizen either of a neutral country or of a country allied with the United States.



to seizure. Since Congress made no other changes in the Act in 1941, a serious question has arisen as to whether an alien friend whose property has been vested under Section 5(b) can still sue for its return under Section 9(a) of the original Act. The problem is whether the amended Section 5(b) permits both seizure and retention of the property of foreign nationals, thus limiting suits under Section 9(a) to American citizens, or whether the change in Section 5(b) was intended merely to broaden the seizure power without changing the Section 9(a) remedy of "non-enemy" claimants.<sup>5</sup>

This issue was recently posed in *Übersee Finanz Korporation v. Markham*.<sup>6</sup> Übersee, a Swiss holding company<sup>7</sup> whose shares in American corporations<sup>8</sup> had been vested by the Alien Property Custodian pursuant to Section 5(b), sued to recover this property under Section 9(a). The District Court dismissed the complaint<sup>9</sup> but the Circuit Court of Appeals for the District of Columbia reversed by a two to one vote. The appellate court construed Section 5(b) as authorizing retention and confiscation of only enemy property. The language of the section as to vesting of all foreign owned property was interpreted as a practical provision to facilitate the immediate seizure of all alien property, subject in the case of neutral property to a later judicial determination of enemy taint. The court concluded that Section 9(a) was still an integral part of the Act, available to non-enemy owners, and that recovery of all non-enemy property would be granted if such claimants could sustain the burden of proof with regard to both the nominal and beneficial ownership. The court specifically rejected the government's argument that Section 9(a) must be construed with the amended Section 5(b) as permitting recovery only where the initial seizure was unauthorized. The government contended that a suit under the Tucker Act for just compensation<sup>10</sup> would meet the constitu-

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5. For the latter view see McNulty, *Constitutionality of Alien Property Controls*, 11 LAW AND CONTEMP. PROB. 135 (1945). Facts emphasized are that § 5(b) contains an acquittance provision similar to that contained in the old § 7(e), a penalty provision similar to that in the old § 16, and finally that it contains its own authorization for the delegation of power by the President. *Id.* at 146 n.53. But see Wechsler, *Constitutionality of Alien Property Controls: A Comment on Remedies*, 11 LAW & CONTEMP. PROB. 149 (1945).

6. 158 F.2d 313 (App. D.C., 1946), *cert. granted* 67 Sup. Ct. 772 (1947).

7. The holding company is reported to have been created for Fritz von Opel, a former "wealthy automobile manufacturer." Von Opel is now a citizen of the Principality of Liechtenstein, having left Germany in 1929, and is at present resident in the United States. N.Y. Times, Feb. 20, 1947, p. 37, col. 1.

8. The interests vested are said to include a chain of midwest filling stations, the Harvard Brewing Company of Lowell, Mass., and the Spur Distributing Company of Nashville. *Ibid.*

9. The dismissal was without opinion. See *Übersee Finanz Korporation v. Markham*, 158 F.2d 313, 314 (App. D.C. 1946).

10. 36 STAT. 1136 (1911), 28 U.S.C. § 250 (1940) permits the recovery in the Court of Claims on any claim "founded upon the constitution of the United States or any law of Congress . . . (or) upon any contract claim express or implied, with the Government of the United States." This provision has been liberally construed by the courts, particularly

tional objections to the retention of friendly alien property, but the court indicated that such a remedy was precluded by Section 7(c) which expressly provides that "the sole relief and remedy of any person having any claim to any money or other property . . . transferred to the Alien Property Custodian shall be that provided by the terms of the Act."<sup>11</sup>

The *Übersee* case conflicts with another recent decision, that of the Court of Appeals for the Second Circuit in *Silesian-American Corporation v. Markham*.<sup>12</sup> In that case the court held that an alien friend could not sue for recovery of property under Section 9(a), but stated that when the government seizes the property of a non-enemy owner, an implied promise arises to pay just compensation and an alien friend may bring suit under the Tucker Act for the value of its seized property. The differing results in the two cases involve questions of constitutionality and statutory interpretation and will be reviewed together by the Supreme Court.

The view of Section 5(b) adopted in the *Silesian-American* case required the court to disregard the express language of both Sections 9(a) and 7(c) despite the refusal of the Supreme Court to indulge in a similar statutory reconstruction of the same Act one year earlier.<sup>13</sup> Moreover, the court's refusal to permit alien friends to sue for the recovery of their property under Section 9(a) would not appear to accord with the intent of Congress, which has twice refused to pass legislation which would have specifically outlawed such suits and relegated alien friends to suits for just compensation under the Tucker Act.<sup>14</sup>

in cases of federal activity resulting in the taking of private property, to permit suits against the government on the theory that the taking of property gives rise to an implied contract to pay just compensation. *Yearsley v. Ross*, 309 U.S. 18 (1940).

11. 40 STAT. 418 (1917), 50 U.S.C. WAR APP. § 7(c) (1940). See dissenting opinion in the *Übersee* case to the effect that a claim for compensation for the taking of property is not a claim to property and hence is not barred by the terms of § 7(c). This view is also espoused by Wechsler, *Constitutionality of Alien Property Controls: A Comment on the Problem of Remedies*, 11 LAW & CONTEMP. PROB. 149, 151 (1945). The majority of the court pointed out that the view of § 5(b) urged by the government and adopted in part by the dissent as vesting had been rejected as untenable in previous cases raising the same point with respect to the seizure provision of the 1917 Act. *See Central Union Trust Co. v. Garvan*, 254 U.S. 554 (1921).

12. 156 F.2d 793 (C.C.A.2d 1946), *cert. denied*, 67 Sup. Ct. 87 (1946); *cert. granted*, 67 Sup. Ct. 769 (1947).

13. *Markham v. Cabell*, 326 U.S. 404 (1945) in which the court refused to read out of § 9 (a) the right which it conferred on non-enemy claimants to sue on a debt owed to them by enemy nationals whose property had been vested.

14. H.R. 4840, 78th Cong., 2nd Sess. (1944) and H.R. 5089, 79th Cong., 2nd Sess. (1946). H.R. 4840 provided that a claimant might institute a suit under § 9(a) to establish that he is not a foreign country or national thereof as defined in § 5(b). Failure to establish these facts would have entitled him to sue in the Court of Claims for just compensation. The bill died in committee. *Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H.R. 4840*, 78th Cong., 2nd Sess. (1944). H.R. 5089 provided in § 33(a) that "a foreign country or national thereof may not institute, prose-

Although the court in the *Silesian-American* case assumed without analysis that the government's construction of the Act—which it adopted—was constitutionally sound, doubts were expressed in the *Uberssee* decision as to whether Congress had the power to provide for the retention<sup>15</sup> of friendly alien property even when compensation is available. Two principal issues appear to be involved: whether Congress has the power to authorize the retention of non-enemy property; and if so, whether a construction of Section 5(b) authorizing such retention and permitting compensation can be sustained under the Fifth Amendment.

Opinion differs as to the constitutional power on which Section 5(b) was designed to rest. However, whether an exercise of the war power,<sup>16</sup> of the

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cute, or further maintain a suit pursuant to §9(a) hereof in respect to any property or interest vested in or transferred to the Alien Property Custodian . . . or the net proceeds thereof . . .” and in § 33(b) provided that “notwithstanding the provisions of § 7(c) such persons shall have the right to bring suit in the Court of Claims for just compensation if so entitled under the Fifth Amendment. This section was deleted by the House Judiciary Committee. The bill, containing § 33, was reintroduced as H.R. 6890 and passed by the House with amendments not material here. However, the same section was deleted by the Senate Judiciary Committee. S. 2378, 79th Cong., 2nd Sess. (1946). The Senate Report accompanying the bill explained the deletion as designed to “eliminate the proposal to cut off the right of a friendly foreign national to sue for and obtain return of his property under § 9(a), (thus preserving) in full these rights under § 9(a) which friendly foreign nationals together with United States citizens, have had for more than twenty-five years under the Act.” SEN. REP. NO. 1839, 79th Cong., 2nd Sess. (1946). The Senate bill as amended by the committee was passed by both Houses with a few members expressing regret over the deletion of § 33, 92 CONG. REC. 10628 (1946). This action was apparently taken as a direct result of the objections to the inclusion of § 33(a) presented by the State Department and by members of various private trade and legal associations. See letter of Secretary Byrnes to Chairman Sumners of the House Judiciary Committee in connection with the hearings on H.R. 5089. *Hearings Before Subcommittee No. 1 of the Committee on the Judiciary on H.R. 5089*, 79th Cong., 2nd Sess. (1946) and *Hearings Before Subcommittee No. 1 on the Judiciary on S. 2378*, 79th Cong., 2nd Sess. (1946).

15. The court utilized the term “vesting” rather than retention. But both in the decision and in the Act as interpreted by the majority, the term “vesting” is used in a dual sense: (1) to refer to the power to seize and retain and (2) to refer to the power merely to seize. Thus under § 5(b) as construed by the court, enemy property can be “vested” in the first sense, whereas friendly alien property can only be “vested” in the second sense. To avoid this confusion, the terms “retention” and “seizure” will be used respectively throughout this Note.

16. Throughout the committee and floor debates preceding passage of § 5(b), the power sought to be exercised here was referred to by members of Congress as resting on the war powers. See note 33 *infra*. However, in the *Silesian-American* case, see note 12 *supra*, Judge Learned Hand assumed without argument that the section cannot rest on the war powers. It may well be that Judge Hand was partially influenced by the facts that § 5(b) applies to periods of national emergency as well as to time of war, and that the Act, unlike closely analogous war-time requisition statutes, contains no indication of the intended use of the property to be vested. See, for example, Act of June 15, 1917, authorizing the requisition of ships, 40 STAT. 182 (1917) and the Property Requisitioning Act, 55 STAT. 741 (1941), 50 U.S.C. § 721 (Supp. 1941).

power of eminent domain,<sup>17</sup> or of any other power granted to the federal government,<sup>18</sup> the constitutional right to seize and retain non-enemy property, with or without compensation, has in the past been acknowledged only where the necessity,<sup>19</sup> or public purpose<sup>20</sup> of the taking is clear. That the "national interest"<sup>21</sup> necessitated the permanent vesting of friendly alien property within the United States is cast in doubt by the alternative means of wartime control that were available to the government. An elaborate system for blocking foreign assets and regulating financial transactions affecting foreign property located in the United States was established by the Treasury Department.<sup>22</sup> In addition, the Alien Property Custodian was empowered to exercise control over the use and operation of foreign property by supervising business enterprises and other classes of foreign property belonging to foreign nationals or in which the latter had an interest.<sup>23</sup> Finally, under the Property Requisition Act of 1941, the government could take over any property directly needed for the war effort.<sup>24</sup>

17. Suggestions have been made that §5(b) might be construed as an exercise of the power of eminent domain. For refutation of this thesis, see Dulles, *The Vesting Powers of the Alien Property Custodian*, 28 CORN. L. Q. 245, 257 (1943). The showing of "public purpose" insisted on by the courts prior to the taking of the property under this power, see note 19 *infra*, would seem to present the same problems raised by the necessity requirement for property seizures under the war powers, see note 18 *infra*.

18. In the *Silesian-American* case *supra* note 11, Judge Learned Hand concluded that §5(b) was an exercise of power under the common defense and general welfare clause. U.S. CONST. Art. I, §8, cl. 1. But the clause has always in the past been construed as a measure of the tax power and not as an affirmative power on which to rest general federal legislation. *United States v. Butler*, 297 U.S. 1 (1937).

19. For the courts' view of the requirement of necessity, see cases sustaining the constitutionality of statutes enacted under the war powers during World War I in DODD, CASES ON CONSTITUTIONAL LAW 517 (1941). For a discussion of the extent of the war powers, see Littauer, *Confiscation of the Property of Technical Enemies* 52 YALE L. J. 739 (1943).

20. For cases involving federal exercise of eminent domain, see *Gettysburg Electric Ry. v. United States*, 160 U.S. 668 (1896) and *United States v. Certain Lands in City of Louisville, Jefferson County, Ky.*, 78 F.2d 689 (C.C.A. 6th 1935).

21. The phrase "national interest" as indicative of the necessity for the power here sought to be exercised appeared in the President's delegation of his authority under §5(b) to the Alien Property Custodian. Exec. Order No. 9193, 7 FED. REG. 5205 (1942). Under this Order the Custodian was empowered to vest property only when he deemed such action was in the national interest.

22. Exec. Order No. 8389, 5 FED. REG. 1400 (1940); for a collection of the executive orders and regulations, circulars and general rulings issued by the Treasury Department in this connection, see DOCUMENTS RELATING TO FOREIGN FUNDS CONTROL (U.S. Treas. Dep't 1944); for a detailed analysis of the freezing program, see Reeves, *The Control of Foreign Funds by the United States Treasury*, 11 LAW & CONTEMP. PROB. 17 (1945).

23. Section 5(b) and Exec. Orders No. 9095 and 9193 issued pursuant to §5(b). See also Myron, *The Work of the Alien Property Custodian*, 11 LAW & CONTEMP. PROB. 71 *et seq.* (1945).

24. 55 STAT. 742 (1941), 50 U.S.C. WAR APP. §§611-32 (Supp. 1942).

If in spite of these additional controls the Supreme Court should affirm the need and with it the power to retain friendly alien property, the constitutionality of the government's construction might still be challenged under the Fifth Amendment. Three questions must be resolved: (1) is an alien friend within the protection of the Fifth Amendment; (2) does this protection include a guarantee against discriminatory legislation; and (3) is Section 5(b) discriminatory through its application to a particular class of individuals rather than to particular property.

The answer to the first question would seem to be clearly in the affirmative. The right of an alien to procedural due process has long been recognized.<sup>25</sup> More recently, in *Russian Volunteer Fleet v. United States*,<sup>26</sup> the Supreme Court held that an alien friend is guaranteed substantive due process as well and must receive just compensation where his property is taken by the government. It would thus seem that *Ubersee* should have no difficulty in invoking protection against outright confiscation. But whether the Fifth Amendment prohibits discrimination as well as confiscation has never been decided. Unlike the Fourteenth, it does not on its face guarantee to all persons equal protection of the laws. It seems neither probable nor reasonable, however, that a discriminatory state statute could be invalidated by the Fourteenth Amendment while the constitutionality of a federal statute equally discriminatory could not be questioned. The Supreme Court has indicated in dicta that a federal statute which is grossly discriminatory would be subject to annulment on the ground that it would be equivalent to confiscation.<sup>27</sup> Moreover, alien friends have been judicially accorded equal protection under the Fourteenth Amendment. State statutes directed towards aliens of a particular nationality,<sup>28</sup> and towards aliens as a class,<sup>29</sup> have been held unconstitutional on this ground, the decisions turning primarily on the unreasonableness of the classification. There would seem to be no logical reason for supposing that the Fifth Amendment does not grant similar protection to alien friends. Considerable dicta in cases relating to the World War I Act to the effect that constitutionality of the seizure provisions would not have been sustained had American citizens and alien friends not been provided with a judicial remedy<sup>30</sup> would seem to be in accord.

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25. *Wong Wing v. United States*, 163 U.S. 228 (1896); *Bilokumsky v. Tod*, 263 U.S. 149 (1923).

26. 282 U.S. 481 (1931), cited with approval, *United States v. Pink*, 315 U.S. 203, 208 (1942).

27. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1936) and see DOWLING, CASES ON CONSTITUTIONAL LAW 968 *et seq.* (1946) for a discussion of this interpretation of the Fifth Amendment.

28. *Yick Wo v. Hopkins*, 118 U.S. 356 (1885).

29. *Truex v. Raich*, 239 U.S. 33 (1915).

30. In construing the 1917 Act the Supreme Court declared that "[the] dominant purpose [of the statute] often recognized by this court, [is] to give to citizens and alien friends an adequate remedy for invasions of their property rights in the exercise of the

Assuming that alien friends are entitled to protection against discrimination, reasonableness of the classification in Section 5(b) must be determined. This, in turn, would seem to depend primarily on whether the vesting of their property was more necessary to the national interest than the vesting of the property of American citizens. The argument that there is a greater possibility that a friendly alien may be a cloak for the enemy may justify different classification with respect to the immediate taking of property, but hardly excuses its permanent retention where the alien can prove absence of enemy taint.

The only question remaining for consideration is whether the view of Section 5(b) adopted in the *Ubersee* decision, permitting recovery by alien friends of non-enemy property, defeats the public policy underlying the Trading With the Enemy Act. This policy has been described by one court<sup>31</sup> as designed to cripple the enemy's commerce, capture his property and decrease his capacity for prolonging hostilities through the use of private resources. To this traditional view should be added the broader Allied policy of rendering impossible a revival of Nazi power by the permanent destruction of the German war potential.<sup>32</sup>

The 1941 amendment of Section 5(b) was not intended to change this basic policy,<sup>33</sup> nor would the *Ubersee* decision appear to place any obstacles in the way of its complete realization. Delay in the liquidation of properties seized

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war powers of the government. Any other construction by denying such a remedy would raise grave doubts of the constitutionality of the statute as applied to non-enemies." *Becker Steel Co. of America v. Cummings*, 296 U.S. 74, 81 (1935). To the same effect, see *Garvan v. \$20,000 Bonds*, 265 Fed. 477, 479 (C.C.A. 2d 1920), in which the court stated that "if persons not alien enemies, or allies of alien enemies were given no means to protect their interests in such property the seizure would be unconstitutional as without due process of law."

31. *Standard Oil Co. v. Markham*, 57 F. Supp. 332 (S.D.N.Y. 1944). For earlier judicial statements on the purposes of trading with the enemy legislation, see *Miller v. United States*, 11 Wall 268 (U.S. 1870), and *United States v. Chemical Foundation*, 272 U.S. 1 (1926). See also ADMINISTRATION OF THE WARTIME FINANCIAL AND PROPERTY CONTROL OF THE UNITED STATES GOVERNMENT 2-4 (U.S. Treas. Dep't, 1942).

32. Cox, Oscar, *Resolution of the Mexican Delegation Dealing with the Problems of Looted and Enemy Property*, 12 DEP'T. STATE BULL. 350 (1945); Arts. 11 and 18 of Tripartite Conference at Berlin, 13 DEP'T STATE BULL. 153 (1945); *Final Act of Inter-American Conference on Systems of Economic and Financial Control of July 10, 1942*, 37 AMER. J. OF INT. L. SUPP. 9 (1943).

33. The brief debate in Congress on the First War Powers Act, Title III of which embraced the amendment to § 5(b), was hurried and somewhat confused. Several members of the House, including those who had considered the bill in committee, clearly regarded the section as applying only to enemy property. Mr. Summers, chairman of the House Judiciary Committee and sponsor of the bill, in response to a question from the floor as to the scope of the amendment, replied that it was simply a section dealing with alien enemies. 87 CONG. REC. 9859 (1941). See also remarks of Mr. Fish to the same effect. *Id.* at 9856. Mr. Hancock declared that the section empowered the President to seize all alien property and that the power was necessary in order to permit the seizure of property "bound for some neutral country which it is expected will eventually reach

by the Custodian<sup>34</sup> and the difficulties involved in proving enemy ownership<sup>35</sup> are possible disadvantages involved in permitting alien friends to sue for the return of their property. They would seem to be overshadowed, however, by the serious repercussions on American foreign policy<sup>36</sup> which might result from the denial of such a right to an alien friend. Not only would such a denial appear contrary to international law,<sup>37</sup> but in so far as alien friends are put in a position inferior to American citizens it would be contrary to

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the enemy." *Id.* at 9861. The debate in the Senate was even more cursory, and the only explanation of the bill was that given by Senator Van Nuys, a member of the Senate Judiciary Committee, who stated that "in a nutshell the bill grants to the President the same war powers exercised during World War I, in provisions for seizure and freezing of alien property the bill goes further and not only freezes but seizes property." *Id.* at 9837.

34. By the terms of §9(a), the institution of a suit for the recovery of property automatically precludes the Custodian from disposing of the property until termination of the suit. Mr. Markham, the Alien Property Custodian, appearing before the House Judiciary Committee, pointed out that the sale of vested property, which is the prime objective of the Alien Property Custodian's Office, would be considerably hampered by permitting §9(a) suits by alien friends, and hence liquidation of the Office would be indefinitely postponed. *Hearings before Subcommittee No. 1 of Committee on the Judiciary on H.R. 5089, 79th Cong., 2nd Sess. 7 (1946).*

35. During the hearings before the House Judiciary Committee on H.R. 6890, representatives of the Department of Justice strongly urged that no suits for the return of vested property by alien friends be permitted because of the difficulties in securing probative evidence of enemy ownership. The force of this argument would seem to be weakened by the fact that §5(b) shifts the burden of proof of non-enemy taint to the claimant; by the greater availability of evidence through the relaxation of foreign bank secrecy laws [see Swiss Decree of May 29, 1945, 61 *AMTICHE SAMMLUNG* 331 (1946)]; and by the interchange of information relating to enemy resources provided for in agreements concluded recently with neutral countries. For the text of agreement with Switzerland see *Negotiations on German Holdings in Switzerland* 14 *DEPT STATE BULL.* 1121 (1946), and with Sweden, 15 *DEPT STATE BULL.* 174 (1946). For a brief description of the sources of information available to the Office of Alien Property Custodian in uncovering German ownership of property, see Myron, *The Work of the Alien Property Custodian*, 11 *LAW & CONTEMP. PROB.* 76, 78-9 (1945).

36. Secretary Byrnes has indicated the possible effects of this action on current attempts to protect American investments abroad. See note 39 *infra*. In addition, the position of the United States as the proponent of democracy and champion of minority rights could not fail to be affected.

37. Doubts have been raised as to the right under international law to confiscate even enemy private property in time of war. *A fortiori*, the confiscation of friendly private property would be contrary to international law. I CALVO, *DICIONNAIRE DE DROIT INTERNATIONAL* 295 (1885); LAWRENCE, *PRINCIPLES OF INTERNATIONAL LAW* 404 (Winfield ed. 1923); II OPPENHEIM, *INTERNATIONAL LAW* 261 (Lauterpacht ed. 1940); III HYDE, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 1735 (1946). This is important to note since it is equally well established that in all cases to which international law is applicable, municipal enactments ought not to be construed so as to violate international law, if any other construction is possible. *Murray v. Schooner Charming Betsy*, 2 Cranch 64 (U.S. 1804); 2 *Dod.* 210 (Eng. Adm. 1819).

traditional American policy.<sup>38</sup> Furthermore, it would seriously embarrass the State Department in its efforts to protect American investments abroad from arbitrary and discriminatory treatment by foreign governments.<sup>39</sup> Finally, as the court in the *Ubersee* case pointed out,<sup>40</sup> "it can not be urged that Congress intended to jeopardize, without adequate remedy, the billions of dollars of Allied and friendly nations' property merely because of its temporary presence in this country in time of war."

The view of Section 5(b) and 9(a) adopted in the *Ubersee* case, permitting alien friends to sue for the return of their property, would thus seem to accord more faithfully with legislative intent, constitutional principles and enlightened self-interest than the interpretation placed on those sections in the *Silesian-American* case.

## PRE-INDICTMENT SUPPRESSION OF INVALID CONFESSIONS\*

Ever since disclosure of the details of *Lillburn's Trial*<sup>1</sup> led to the demise of the Court of Star Chamber,<sup>2</sup> protection of the accused from coerced admissions of criminal guilt has been a basic tenet of Anglo-American law. In the federal courts of the United States, the Fifth Amendment to the Con-

38. The United States has consistently bound itself by treaty to accord to all aliens resident within its jurisdiction the right to access to American courts, to that degree of protection for their persons and property required by international law, and to just compensation and due process of law if their property should be taken. See, e.g., Article 1 of the Convention of Friendship with the Swiss Confederation concluded in 1850, 11 STAT. 587 (1850); Article 1 of the Treaties of Friendship and Commerce with Germany, 44 STAT. 2132 (1923); Estonia, 44 STAT. 2397 (1925); Hungary, 44 STAT. 2441 (1925); Latvia, 45 STAT. 2641 (1928); Norway, 47 STAT. 2135 (1928); Poland, 48 STAT. 1507 (1931); and Finland, 49 STAT. 2659 (1934).

39. This point was strongly urged in a letter by Secretary of State Byrnes to the Judiciary Committee of the House at the time it was considering H.R. 5089. *Hearings before the Subcommittee No. 1 of the Committee on the Judiciary on H.R. 5089*, 79th Cong., 2nd Sess. 28-9 (1946). Byrnes pointed out that the clause eliminating the right of an alien friend to sue for the return of his property "carries a grave threat to the property of American nationals in foreign countries and to the ability of the State Department to obtain fair and equitable local treatment of such property interests of United States nationals . . . to which the Department finds strong objection both on principle and on grounds of the enlightened self interest of the United States."

40. 158 F.2d 313 (App. D.C., 1946), cert. granted, 67 Sup. Ct. 772 (1947).

\* *In re Fried*, 161 F.2d 453 (C. C. A. 2d Feb. 25, 1947), reversing in part Application of Fried, 68 F. Supp. 961 (S. D. N. Y. 1946), cert. granted sub nom. United States v. Fried, 15 U. S. L. WEEK 3475 (U. S. June 23, 1947).

1. 3 How. St. Tr. 1315 (1637).

2. 16 CAR. I., c. 10 (1640). See Wigmore, *The Privilege Against Self-Crimination*, 15 HARV. L. REV. 610, 624-6 (1902).



stitution bars judicial insistence upon self-incriminating testimony.<sup>3</sup> The Supreme Court, however, not content with enforcing the minimal provisions of the Constitution, has assumed the affirmative duty of prescribing modes of criminal procedure appropriate to a democratic society. Within this realm of conscious judicial policy the Court has, by its own acknowledgment, "from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions."<sup>4</sup>

To prevent police coercion of the suspect, the Supreme Court has proscribed the introduction in evidence of confessions obtained through the "third degree" not only in federal<sup>5</sup> but also in state<sup>6</sup> criminal trials. In *McNabb v. United States*<sup>7</sup> the Court attempted further to discourage the use of the "third degree" in federal prosecutions<sup>8</sup> by excluding confessions which, while not demonstrably involuntary, were made to federal officers who had failed to present the accused for arraignment with the celerity required by statute.<sup>9</sup> Similarly, the Court has held that where the Government has seized the suspect's documents or other property in violation of the Fourth Amendment,<sup>10</sup> federal courts must on timely motion suppress the use and require the return of such evidence, regardless of its relevance or credibility;<sup>11</sup> nor can

3. "... [N]or shall any person . . . be compelled in any criminal case to be a witness against himself. . . ."

4. *McNabb v. United States*, 318 U. S. 332, 341 (1943).

5. The use of "third degree" confessions as evidence in federal trials violates the Fifth Amendment's privilege against self-incrimination. *Bram v. United States*, 163 U. S. 532, 542 (1897). See *Wan v. United States*, 266 U. S. 1, 14-5 (1924); cf. *Wilson v. United States*, 162 U. S. 613, 623 (1896).

6. The use of such confessions as evidence in state trials violates the Fourteenth Amendment's due process clause. *Malinski v. New York*, 324 U. S. 401 (1945); *Ashcraft v. Tennessee*, 322 U. S. 143 (1944); *White v. Texas*, 310 U. S. 530 (1940).

7. 318 U. S. 332 (1943).

8. The *McNabb* rule does not apply to state trials. *Id.* at 340, 347.

9. 28 STAT. 416 (1894), as amended, 31 STAT. 956 (1901), 18 U. S. C. § 595 (1940).

10. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

11. The Court arrived at this position only after a circuitous judicial journey. In *Boyd v. United States*, 116 U. S. 616 (1886), where the Court invalidated a federal statute providing for the subpoena of personal records in a forfeiture proceeding, dictum of the *a fortiori* variety suggested that evidence seized without a warrant was clearly inadmissible, *id.* at 633, a departure from the established common-law rule that courts will not question the legality of acquisition of otherwise competent evidence. *Williams v. State*, 100 Ga. 511, 28 S. E. 624 (1897); see *Commonwealth v. Dana*, 2 Metc. 329, 337-8 (Mass. 1841). The issue was not relitigated before the Court for eighteen years; then, in *Adams v. New York*, 192 U. S. 585 (1904), the Court, although holding the challenged seizure not unconstitutional, appeared by dictum inserted *arguendo*, *id.* at 594-9, to repudiate the dictum of the *Boyd* case. The *Adams* decision was thought to have buried what seemed at most a momentary heresy. See *United States v. Wilson*, 163 Fed. 338, 340-4 (C. C. S. D. N. Y. 1903). Ten years later, however, in *Weeks v. United States*, 232 U. S. 383 (1914), Justice Day explained for the unanimous Court that his opinion in the unanimous *Adams* decision had

the Government thereafter subpoena evidence recovered pursuant to such motion.<sup>12</sup> The Court in the first episode of *Nardone v. United States*<sup>13</sup> extended this doctrine by excluding as evidence recordings of telephone conversations where the tapping of wires, although constitutional,<sup>14</sup> violated a federal statute;<sup>15</sup> subsequently the Court held inadmissible evidence clearly derived from such recordings—the “fruit of the poisonous tree.”<sup>16</sup>

In fashioning the pre-trial motion to suppress tangible evidence, the Court sought simultaneously both to preclude the use at trial of illegally procured evidence and to prevent the interjection at trial of the dilatory defense of inadmissibility. More recently the Court has sanctioned consideration of the motion prior to indictment,<sup>17</sup> thus forestalling the injury of false indictment and the expense of fruitless grand jury proceedings. In compelling the exclusion at trial of illegally acquired confessions, however, the Court has not been called on to determine the propriety of their pre-trial suppression; and inferior federal courts are not in harmony.<sup>18</sup> The Court in reviewing

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merely precluded the litigation of illegal seizure at trial, and that unconstitutionally seized evidence was inadmissible where a motion to suppress was made in advance of trial. Subsequently the Court permitted exclusion at trial where the defendant had no knowledge of the unlawful seizure until the introduction of the evidence at trial, *Gouled v. United States*, 255 U. S. 298, 305 (1921), or where a pre-trial motion to suppress had been erroneously overruled. *Id.* at 312-3; *Amos v. United States*, 255 U. S. 313 (1921). Conceptually the doctrine of exclusion rests on the theory that the use at trial of evidence obtained in violation of the Fourth Amendment violates the Fifth Amendment's privilege against self-incrimination. See *Boyd v. United States*, *supra* at 630-5. The privilege also bars compulsion to testify before a grand jury. *Hale v. Henkel*, 201 U. S. 43, 66 (1906). For a comprehensive view of the problem of “unreasonable searches and seizures,” see Justice Frankfurter's dissenting opinion in *Harris v. United States*, 15 U.S.L. WEEK, 4492, 4495 (U. S. 1947). See generally, Wood, *The Scope of the Constitutional Immunity against Searches and Seizures*, 34 W. VA. L. Q. 1 (1927); Nelson, *Search and Seizure: Boyd v. United States*, 9 A. B. A. J. 773 (1923); Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921).

12. *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920).

13. 302 U. S. 379 (1937).

14. *Olmstead v. United States*, 277 U. S. 438 (1928). In 1942 the Court, with three justices dissenting, expressly refused to overrule the *Olmstead* decision. *Goldman v. United States*, 316 U. S. 129, 135-6 (1942).

15. 48 STAT. 1103 (1934), 47 U. S. C. § 605 (1940).

16. *Nardone v. United States*, 308 U. S. 338, 341 (1939).

17. *Go-Bart Importing Co. v. United States*, 282 U. S. 344 (1931); see *Cobbledick v. United States*, 309 U. S. 323, 328-9 (1940); *Perlman v. United States*, 247 U. S. 7, 12 (1918).

18. In *United States v. Lydecker*, 275 Fed. 976, 978 (W. D. N. Y. 1921), the court denied a pre-trial motion to suppress an allegedly coerced confession, distinguishing the pre-trial suppression of illegally seized tangible evidence on the ground that the former motion went to the credibility of the challenged evidence and should therefore more appropriately be entertained by the trial judge in the context of a fuller knowledge of the case. However in *Ah Fook Chang v. United States*, 91 F.2d 805, 807-9 (C. C. A. 9th 1937), dismissal on the merits of a pre-trial motion to suppress an allegedly coerced confession was affirmed without any suggestion that the remedy would have been unavailable

In re *Fried*<sup>19</sup> will consider the further and wholly novel question of whether inadmissible confessions, like inadmissible tangible evidence, should be stricken in advance of indictment.

The case arose in a federal district court on a motion to suppress confessions—elicited by agents of the Federal Bureau of Investigation through pre-arraignment interrogations lasting variously from four to eleven hours—of four men ultimately presented for arraignment more than eighteen hours after their allegedly invalid arrests. District Judge Rifkind, recognizing the case as one of first impression, felt that to suppress confessions before indictment would be to introduce an anomalous remedy, since there is no clearly established practice of suppressing invalid confessions between indictment and trial. This view overlooks the premise of the instant motion: that the suspect has a justifiable interest in avoiding the indignity of indictment by advance suppression of his invalid confession. One already under indictment is adequately protected from the remaining legal hazard of conviction by his opportunity to exclude the invalid confession at trial.

Not willing, however, to ground his decision solely on the maintenance of a questionably useful "legal symmetry," Judge Rifkind found in the alternative no adequate affirmative reason for increasing the quantity of pre-trial litigation.<sup>20</sup> He admitted that the pre-indictment suppression of tangible evidence might arguably support the pre-indictment suppression of uncoerced and hence presumably credible confessions which are inadmissible at trial because "obtained in the course of some other violation of the confessor's rights, such as unlawful search or delayed arraignment."<sup>21</sup> Believing, however, that most allegedly invalid confessions are challenged as products both of coercion and of other illegality, and that the issues of credibility raised by possible coercion are best settled at trial, Judge Rifkind rejected any distinction between types of confessions. Accordingly he dismissed the motion without taking testimony on the merits of the confessors' allegations.

The Circuit Court of Appeals for the Second Circuit reversed in an opinion by Judge Frank and a concurring opinion by Judge Learned Hand, holding over Judge Augustus Hand's dissent that "confessions shown to have resulted from constitutional violations" may be suppressed.<sup>22</sup> To determine

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had the confession been found involuntary. In *United States v. Pollack*, 64 F. Supp. 554 (D. N. J. 1946), the court unquestioningly granted pre-trial suppression of a confession and of seized documents where the federal officers were shown to have entered under color of an invalid search warrant. It will be observed that the rationale of *United States v. Lydecker*, *supra*, is inapplicable to the type of confession suppressed in *United States v. Pollack*, *supra*, or excluded in the *McNabb* case which, like illegally seized tangible evidence, is inadmissible as evidence without reference to its inherent credibility.

19. 161 F. 2d 453 (C. C. A. 2d 1947), *reversing in part*, Application of *Fried*, 68 F. Supp. 961 (S. D. N. Y. 1946).

20. Application of *Fried*, *supra* note 19, at 963.

21. *Ibid.*

22. 161 F. 2d 453, 460 (C.C.A. 2d 1947).

the constitutional validity of the confessions the cause was remanded for appropriate findings.<sup>23</sup> It appears from the confessors' affidavits that any or all of the arrests may have been invalid<sup>24</sup> and hence in violation of the confessors' right under the Fourth Amendment "to be secure in their persons . . . against unreasonable searches and seizures."<sup>25</sup> Furthermore the delay

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23. The Supreme Court has granted certiorari to review the reversal. *United States v. Fried*, 15 U. S. L. WEEK 3475 (U. S. June 23, 1947).

24. The validity of the arrests of two of the confessors was litigated in the district court pursuant to Judge Rifkind's consideration of a companion motion to suppress documents taken from the two on arrest. Judge Rifkind concluded that as a matter of law the arrest warrant (naming all four confessors) was invalid, since the complaint on which the warrant issued set forth allegations of criminality based on the complainant's mere "information and belief," Transcript of Record, p. 219, *Fried v. United States*, 161 F. 2d 453 (C. C. A. 2d 1947), rather than on the requisite representation of the complainant's factual knowledge. *Darnall v. United States*, 33 A.2d 734, 736 (Mun. App. D.C. 1943); *accord*, *United States v. Pollack*, 64 F. Supp. 554, 558 (D. N.J. 1946). See *Byars v. United States*, 273 U. S. 28, 29 (1927); *Ripper v. United States*, 178 Fed. 24, 26 (C.C.A. 8th 1910); *United States v. Rykowski*, 267 Fed. 866, 868 (S. D. Ohio 1920). Furthermore Judge Rifkind found as a fact that the arresting agents had no such "probable cause" for believing that the two from whom the documents were taken had committed a felony and were likely to escape unless apprehended as would alone justify an arrest without a warrant. U. S. CONST. AMEND. IV; 48 STAT. 1008 (1934), as amended, 49 STAT. 77 (1935), 5 U. S. C. § 300a (1940). [For a contemporary example of judicial reluctance to find "probable cause," see Judge Learned Hand's opinion for the court in *United States v. Di Re*, 159 F.2d 818 (C.C.A. 2d 1947)]. Judge Rifkind decided, however, to dismiss the motion to suppress the documents on the grounds that one of the two arrested had consented to the seizure and had authority so to consent—a finding of fact which the Second Circuit did not and could not disturb. *United States v. Bianco*, 96 F.2d 97, 98 (C. C. A. 2d 1938). The confessors failed to get certiorari from the Supreme Court to review the Second Circuit's affirmation of the dismissal of the motion to suppress the documents. 15 U. S. L. WEEK 3475 (1947). The theory of this petition for certiorari was that one unconstitutionally detained through invalid arrest cannot by professed consent to seizure of his documents make an intelligent waiver of his further constitutional right to be secure in the possession of those documents, since such waiver is not to be lightly assumed. See *United States v. Hoffenberg*, 24 F. Supp. 989, 990 (E. D. N. Y. 1938); *United States v. Ruffner*, 51 F. 2d 579, 580 (D. Md. 1931). In estimating the validity of the instant arrests it should be remembered that Judge Rifkind took testimony only as to two of the arrests, and that even as to these two his determinations of invalidity were unnecessary to his dismissal of the joint motions and are therefore not technically conclusive.

25. It is not clear from the Second Circuit's decision in the *Fried* case that confessions made subsequent to invalid arrest are necessarily "confessions shown to have resulted from constitutional violations," within the meaning of Judge Frank's opinion, and hence subject to pre-indictment suppression. Invalid arrest is a breach of the Constitution. *Albrecht v. United States*, 273 U.S. 1, 5 (1927); *Darnall v. United States*, 33 A.2d 734, 736 (Mun. App. D. C. 1943). The concurring opinion of Judge Learned Hand indicates, however, that he understood the *Fried* decision merely as extending the remedy of suppression afforded "documents seized in violation of the Fourth Amendment" to "confessions procured in violation of the Fifth Amendment." 161 F. 2d 453, 469 (C. C. A. 2d 1947). Read in this light, it would appear that the court's decision sanctions the suppression only of confessions procured through coercion, which violates the Fifth Amendment,

in arraignment may not only have breached the letter of statutory command<sup>23</sup> and of the newly-adopted Federal Rules of Criminal Procedure,<sup>27</sup> but may

see note 5 *supra*, and not of confessions procured through invalid arrest, which is a "violation of the . . . Fourth Amendment." *Albrecht v. United States*, *supra* at 5. It is to be recalled that on a conceptual level unlawfully seized documents, although procured in violation of the Fourth Amendment, have been suppressed only because their use as evidence is held to violate the Fifth Amendment's privilege against compulsion to give self-incriminating testimony. See note 11 *supra*. It is arguable, therefore, that an illegal seizure of documents compels self-incrimination whereas a voluntary confession made subsequent to an invalid arrest does not. On the other hand it may be argued that an invalid arrest is itself so coercive as to make impossible an intelligent waiver of the suspect's constitutional right to silence, in reliance on the same theory on which review was sought in the instant case of the finding that one under invalid arrest could make effective consent to seizure of his documents. See note 24 *supra*. The weakness of this argument is that the coercive effect of arrest is not magnified by an invalidity unknown to the suspect; and the Supreme Court has repeatedly pointed out that a confession is not rendered inadmissible merely by virtue of the fact that the confessor is under arrest. See *Wan v. United States*, 266 U.S. 1, 14 (1924); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 157 (1923); *Wilson v. United States*, 162 U. S. 613, 623 (1896); *Sparf and Hansen v. United States*, 156 U. S. 51, 55 (1895).

If the meaning of the Second Circuit's holding in the *Fried* case is, however, to be derived from Judge Frank's opinion for the court, it may readily be urged that confessions made subsequent to invalid arrest are "confessions shown to have resulted from constitutional violations," in the sense that the confession would not have been made absent the precedent (unconstitutional) arrest and detention. In the *McNabb* case, for example, the mere priority in time of the unlawful delay in arraignment made the subsequent confessions inadmissible. See *United States v. Mitchell*, 322 U. S. 65, 70 (1944). This causal connection was made clear in *United States v. Heitner*, 149 F.2d 105 (C. C. A. 2d 1945), where a confession was attacked on the grounds of the alleged invalidity of the precedent arrest. Judge Learned Hand found the arrest valid, but he first explained with care the reason for determining the arrest's validity: ". . . it is a reasonable—indeed an inevitable—inference that the admission resulted from the arrest in the sense that Cryne would not have answered, had he not been in custody. For that reason the lawfulness of the arrest becomes relevant." *Id.* at 106. In *Nueslein v. District of Columbia*, 115 F.2d 690 (App. D. C. 1940), the trial court had admitted a confession made voluntarily to federal officers who entered the defendant's home without permission or a search warrant. Chief Justice Vinson, then an Associate Justice of the Court of Appeals for the District of Columbia, wrote the opinion of reversal which held that the officers had trespassed in violation of the Fourth Amendment: "The Amendment does not outline the method by which the protection shall be afforded, but some effective method must be administered; the protection granted by constitutional provisions must not be dealt with as abstractions. A simple, effective way to assist in the realization of the security guaranteed by the IVth Amendment, in this type of case, is to dissolve the evidence that the officers obtained after entering and remaining illegally in the defendant's home." *Id.* at 695.

26. ". . . [T]he person arrested shall be taken immediately before a committing officer." 48 STAT. 1008 (1934), as amended, 49 STAT. 77 (1935), 5 U. S. C. § 300a (1940).

27. "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States." FED. R. CRIM. P., 5(a).

also have led to interrogation which was so overtly terroristic<sup>28</sup> or at least so "inherently coercive"<sup>29</sup> as to violate the Fifth Amendment.

Judge Frank's opinion met and squarely overruled the Government's principal contention, warmly supported by Judge Augustus Hand, that pre-indictment suppression of invalid confessions represented an inappropriate extension of a rule designed to safeguard the accused's property rights in personalty unlawfully taken. It is apparent that Rule 41(e),<sup>30</sup> pursuant to which motions to suppress are entertained, was drafted to formalize the remedy for the unlawful seizure of "tangible objects,"<sup>31</sup> and that the Rule is "a restatement of existing law and practice."<sup>32</sup> However, as Judge Frank pointed out, the Rule explicitly provides for the suppression as evidence of objects to whose return the suspect is not entitled because, although illegally taken, they are "otherwise subject to lawful detention."<sup>33</sup> The Supreme Court has made it abundantly clear that a suspect's right to possession of evidence is not decisive of his right to its suppression; the policies dictating the exclusion of evidence "make the criterion of immunity not the ownership of property but the 'physical or moral compulsion' exerted" by the United States to obtain such property.<sup>34</sup>

An injudicious appeal to history was also the basis of Judge Augustus Hand's alternative dissenting argument that the Supreme Court's adoption of the pre-trial motion to suppress was calculated not to benefit the suspect but to protect the Government at trial from the surprise defense of inadmissibility. That the Court was primarily so motivated is at least questionable.<sup>35</sup> But,

28. Each of the four confessors alleged that he had been threatened during his interrogation. Transcript of Record, pp. 6, 15, 19, 21, *Fried v. United States*, 161 F. 2d 453 (C. C. A. 2d 1947). Whatever type of pressure is applied, a confession which is demonstrably involuntary is inadmissible at a federal criminal trial. See *Wan v. United States*, 266 U. S. 1, 14-5 (1924); *Wilson v. United States*, 162 U. S. 613, 623 (1896).

29. *Ashcraft v. Tennessee*, 322 U. S. 143, 154 (1944). There the Court held that the mere lapse of time between arrest and arraignment—in that case, thirty-six hours—could in combination with continuous interrogation and lack of sleep be so coercive as to obviate the need for proof of specific instances of inducement or intimidation.

30. FED. R. CRIM. P.

31. *Id.*, Rule 41(g).

32. FEDERAL RULES OF CRIMINAL PROCEDURE WITH NOTES AND INSTITUTE PROCEEDINGS (1946) 70.

33. FED. R. CRIM. P., 41(e).

34. *Perlman v. United States*, 247 U. S. 7, 15 (1918). The distinction becomes important where the property is contraband: thus the Government need not return but cannot introduce in evidence illegally seized equipment for the unlawful manufacture of liquor. *United States v. Rykowski*, 267 Fed. 866 (S. D. Ohio 1920). Cf. *Cheng Wai v. United States*, 125 F.2d 915 (C.C.A. 2d 1942).

35. Scholarly analysis suggests that the Court's holding in *Weeks v. United States*, 232 U. S. 383 (1914), that the admissibility of documents seized in violation of the Fourth Amendment could be challenged by appropriate pre-trial motion, was primarily a device for distinguishing *Adams v. New York*, 192 U. S. 585 (1904), in which the Court had reverted from the dictum of *Boyd v. United States*, 116 U. S. 616, 630-5 (1886) to the

assuming the analysis to be correct, the Government is not necessarily less surprised by the exclusion of a confession it has unlawfully extracted than by the exclusion of documents it has unlawfully seized. Expanding the scope and hence the efficacy of the motion to suppress would implement the Government's protection against surprise—a utility which is not vitiated by the fact that the motion incidentally benefits the litigant who brings it into play.

The Government's supplementary contentions—that indictment under a confession inadmissible at trial is no injury, and that suppression of such confessions will needlessly multiply litigation—likewise lead to unacceptable conclusions. On the one hand the Government is forced to admit an interest in the indictment of those it may have no present expectation of convicting.<sup>36</sup> On the other hand determination of a confession's admissibility after a trial has begun runs afoul of the Supreme Court's recent injunction that "timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the Government in obtaining testimony," since "[t]o interrupt the course of a trial for such auxiliary inquiries impedes the momentum of the main proceeding and breaks the continuity of the jury's attention."<sup>37</sup> Both contentions, furthermore, can be urged as appropriately and to as little avail against the pre-indictment suppression of tangible evidence.<sup>38</sup>

Judge Frank would have gone further and sanctioned the suppression not only of confessions which are obtained in violation of the Constitution, but also of those which are obtained in violation of statute and hence are inadmissible at trial under the *McNabb* rule. But to this Judge Learned Hand could not agree. Feeling "too much the force of consistency" to deny suppression merely because of the intangible nature of a confession, he nevertheless circumscribed the remedy by limiting its application to direct breaches of the Constitution.<sup>39</sup>

There is no readily apparent reason for Judge Learned Hand's distinction. To the extent that he shared Judge Augustus Hand's anxiety over the possible multiplicity of dilatory motions, the short answer would seem to be that

common-law rule that the source of inherently credible evidence is irrelevant to its admissibility at trial. 8 WIGMORE, EVIDENCE § 2184 n.1 (c) (3d ed. 1940); cf. *id.* at § 2183. See Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence*, 15 SO. CALIF. L. REV. 60, 62 (1941). See note 11 *supra*.

36. If the Government cannot obtain an indictment without reliance upon a confession concededly inadmissible at trial, it *a fortiori* does not have enough evidence other than the confession to get a conviction, since the Government's burden of proof at trial is at least equal to and normally greater than its burden of proof before the grand jury.

37. *Nardone v. United States*, 308 U. S. 338, 341-2 (1939).

38. The Government also urged the *reductio ad absurdum* that pre-indictment suppression of invalid confessions would compel pre-indictment suppression of the Government's potential use of hearsay or otherwise incompetent evidence. The argument misrepresented the confessors' position, which is that consistency demands pre-indictment determination in respect to confessions of exactly the issue customarily determined in respect to tangible evidence—the legality of the Government's acquisition thereof.

39. 161 F. 2d 453, 465 (C. C. A. 2d 1947).

the parent *McNabb* rule, which tests a confession's admissibility at trial on the very statutory violation at issue in the instant case,<sup>40</sup> has itself produced far more furor than litigation.<sup>41</sup> Indeed, the court's compromise would seem to compel the marking-out of an area of self-duplicating litigation which might have been avoided had the new remedy been shaped to suppress all illegally acquired confessions. Issues of constitutional and statutory violation are generally intermingled in cases of challenged confessions, and federal courts must now assume the pre-indictment burden of disentangling the different strands of illegality.<sup>42</sup> Thus under the *Fried* rule the court must take testimony on and then dismiss the pre-indictment motion of one who alleges coercive detention but proves only an illegal delay in arraignment—even though repetition of the same proof at trial will make ultimate exclusion of the confession mandatory.

Questions of practicality aside, Judge Learned Hand may have thought that limiting pre-indictment suppression to unconstitutional confessions would make the new remedy the precise conceptual equivalent of the pre-indictment motion to suppress tangible evidence, since only unconstitutionally seized tangible evidence has heretofore been suppressed prior to indictment. But to fashion the new procedure so closely upon the conceptual pattern of the old would be to stress the incidental and ignore the essential purposes of the remedy. The fact is that unconstitutional seizure is the only kind of illegal acquisition which has resulted in the exclusion of tangible evidence at trial, and there is therefore no recognized category of tangible evidence inadmissible at trial by reason of its illegal source which cannot be suppressed before indictment.<sup>43</sup> Since confessions, by contrast, are excluded at trial when

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40. The statutory violation proved in the *McNabb* case and alleged in the *Fried* case was the arresting officers' delay in arraignment. Although there is a difference in wording between the *McNabb* statute, 28 STAT. 416 (1894), as amended, 31 STAT. 956 (1901), 18 U. S. C. § 595 (1940), and that applicable in the instant case, 48 STAT. 1008 (1934), as amended, 49 STAT. 77 (1935), 5 U. S. C. § 300a, federal courts have interpreted these and other arraignment statutes as requiring a uniform standard of compliance. Dession, *The New Federal Rules of Criminal Procedure: I*, 55 YALE L. J. 694, 707 (1946). Federal Rule of Criminal Procedure 5(a), which requires that one arrested shall be arraigned "without unnecessary delay," differs in wording from both these statutes; according to its drafters, however, Rule 5(a) "supersedes all statutory provisions on this point. . . ." NOTES AND INSTITUTE PROCEEDINGS, *op. cit. supra* note 32, at 7.

41. See Dession, *supra* note 40, at 712-3. For an exhaustive treatment of the practical effect of the *McNabb* decision see Comment, *Illegal Detention and the Admissibility of Confessions*, 53 YALE L. J. 758 (1944).

42. Precisely because such issues are commonly inextricable, Judge Rifkind refused to permit a more functional differentiation—pre-indictment litigation of a confession's legality, and postponement until trial of the litigation of its credibility. See *supra* p. 1079.

43. If wire-tapping is conceived to be a seizure of tangible evidence, it must be conceded to be an example of a seizure whose mere violation of statute renders the resultant evidence inadmissible at trial. Conversely, however, classification of wire-tapping as a seizure would appear to negate the proposition that the Supreme Court would hold premature a pre-trial or pre-indictment challenge to seized evidence grounded on an alleged



acquired merely in violation of statute, it would seem not unlikely that Congress and the Supreme Court have chosen to subject the use of this class of evidence to a more exacting scrutiny. This policy the Second Circuit's distinction in the *Fried* case does little to implement.<sup>44</sup>

The only explicit philosophic basis for the court's categorizing of confessions is Judge Learned Hand's feeling that constitutional rights are entitled to preferential treatment, "because of the higher respect" in which they are held.<sup>45</sup> If this superficially attractive proposition is to be given an operative effect in the instant case, it should follow that justice is put in greater jeopardy by indictments based on unlawfully seized documentary evidence than by indictments based on a *McNabb* confession. But comparison of the reasons which underlie exclusion of these two types of illegal evidence indicates that admission of the latter is the more serious threat to the appropriate administration of criminal law.

The exclusion as evidence of unconstitutionally seized documents is clearly not a reflection upon the credibility of the documents. Rather it is a natural concomitant of the privilege against self-incrimination,<sup>46</sup> and a declaration of

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statutory violation. In 1942 the Court expressly approved the procedure of entertaining a motion to suppress evidence allegedly obtained by wire-tapping at the opening of a trial rather than after the taking of testimony had begun. *Goldstein v. United States*, 316 U. S. 114, 115 (1942). That the Court feels the trial's beginning to be the last rather than the first appropriate moment for the initial entertainment of such a motion is indicated by the fact that in a companion decision the Court affirmed without comment on the procedure convictions which followed the dismissal on the merits of a pre-trial motion to suppress evidence allegedly obtained by wire-tapping. *Goldman v. United States*, 316 U. S. 129 (1942). It is to be noted that pre-indictment motions to suppress wire-tapping would necessarily be infrequent, since wire-tapping is a form of evidentiary acquisition of which the suspect is peculiarly unlikely to be aware in the early stages of a criminal prosecution.

44. The rationale of the *McNabb* decision expressed for the Court by Justice Frankfurter suggests that inferior federal courts should adopt a more affirmative concept of judicial responsibility: "Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. . . . A statute carrying such purposes is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application." 318 U. S. 332, 342-3 (1943). Since grand jury procedure is a form of "judicial inquiry," *Hale v. Henkel*, 201 U. S. 43, 66 (1906), it would seem that federal courts should not be "heedless" of opportunities to reform that procedure; judicial refusal to enjoin the submission to grand juries of confessions obtained in disregard of a statute would appear to violate the spirit of the *McNabb* rule by "making the courts themselves accomplices in willful disobedience of law." *McNabb v. United States*, 318 U. S. 332, 345 (1943).

45. 161 F. 2d 453, 465 (C. C. A. 2d 1947).

46. See *United States v. Lefkowitz*, 285 U. S. 452, 466 (1932); *Boyd v. United States*, 116 U. S. 616, 630 (1886).

democratic policy that the United States will not meet crime with crime.<sup>47</sup> But this exclusion, although firmly established in the federal courts, is historically a much criticized<sup>48</sup> departure from the common-law rule that courts will not inquire into the legality of acquisition of evidence whose credibility is not in question.<sup>49</sup> The Court, in allowing states to admit such unlawfully seized evidence, has indicated that exclusion is not a necessary component of due process.<sup>50</sup> Likewise, states are at liberty to revoke the privilege against self-incrimination,<sup>51</sup> since, in Justice Cardozo's words, "[j]ustice . . . would not perish if the accused were subject to a duty to respond to orderly inquiry."<sup>52</sup>

By contrast, confessions which follow legal arrest and illegal delay in arraignment may suffer no technical constitutional disability; but they are from an evidentiary point of view far less reliable indices of truth than such unconstitutional evidence as documents seized without warrant or even confessions made immediately following invalid arrest. Lengthy pre-arraignment detention, as the Supreme Court recognized in *Ashcraft v. Tennessee*,<sup>53</sup> is itself an aspect of coercion whose exercise increases the likelihood that resultant confessions are a gauge of inducement and not a guide to truth.<sup>54</sup> Thus considered, the confession adduced by unlawful detention is triply vulnerable: it is doubtfully credible; it is the product of the Government's lawless act; and it offers leeway, as the Court recognized in laying down the *McNabb* rule, to the ultimate lawlessness of the "third degree."<sup>55</sup>

The *McNabb* rule, like the exclusion of evidence gained in violation of the constitutional freedom from unlawful search and seizure and the constitu-

47. *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392 (1920).

48. See Judge Cardozo's opinion for the New York Court of Appeals in *People v. Defore*, 242 N. Y. 13, 150 N. E. 585 (1926), *cert. denied*, *Defore v. New York*, 270 U. S. 657 (1926); 8 WIGMORE, EVIDENCE §§ 2184, 2184a (3d ed. 1940).

49. *Id.* at § 2183; see note 11 *supra*.

50. The Court, in *Adams v. New York*, 192 U. S. 585 (1904), refused to decide whether the Fourth Amendment was binding on the states. In 1926, however, the New York Court of Appeals expressly rejected the federal rule of exclusion laid down by the Supreme Court in *Weeks v. United States*, 232 U. S. 383 (1914), and subsequent cases, and held that the Fourth Amendment was not binding on the states. *People v. Defore*, 242 N. Y. 13, 150 N. E. 585 (1926). The Supreme Court refused to grant certiorari. *Defore v. New York*, 270 U. S. 657 (1926).

51. *Twining v. New Jersey*, 211 U. S. 78 (1908).

52. *Palko v. Connecticut*, 302 U. S. 319, 326 (1937). The classic criticism of the privilege against self-incrimination is Jeremy Bentham's. 7 BENTHAM, WORKS 445-68 (1843).

53. 322 U. S. 143 (1944).

54. Blackstone observed long ago that confessions uttered outside the court-room "are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence." 4 BL. COMM. § 357.

55. See note 44 *supra*.

tional privilege against self-incrimination, is binding only on federal courts.<sup>56</sup> Unlike the two constitutional rules, however, the *McNabb* rule was devised to implement the due process of law.<sup>57</sup> However high the respect in which the Supreme Court may hold other constitutional provisions, in defining due process the Court avowedly reaches "a different plane of social and moral values."<sup>58</sup> And it is on this plane that the Court anathematizes use of the "third degree," since judicial reliance "upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol."<sup>59</sup>

The purpose of the *McNabb* rule was to curb even the potential use of the "third degree" by holding confessions made subsequent to unlawful detention inadmissible per se without requiring proof of overt breach of the Constitution. To enjoin the submission to a grand jury of confessions concededly inadmissible at trial would seem the logical supplement to the *McNabb* rule which might stop at its source the last inducement to "lawlessness in law enforcement."<sup>60</sup> Academic observation that illegal police action invites civil and criminal sanctions<sup>61</sup> serves to emphasize the cognizable legal injury of frivolous indictment, but ignores the fact that such sanctions are almost never applied.<sup>62</sup> The implied license to lawlessness inherent in a metaphysical distinction between a seizure of evidence which is unconstitutional and one which is merely felonious may be met on a metaphysical level by recollection that both the "Constitution, and the Laws of the United States . . . shall

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56. See note 8 *supra*.

57. It should be recalled that, conceptually speaking, "third degree" confessions are barred by federal courts because they violate the Fifth Amendment's privilege against self-incrimination rather than the same amendment's due process clause. See notes 5 and 25 *supra*. However in reviewing state criminal procedure the Court has assimilated the ban on "third degree" confessions to the Fourteenth Amendment's due process clause. See note 6 *supra*. The Court makes no operative distinction between the two. See *Ashcraft v. Tennessee*, 322 U.S. 143, 154 n. 9 (1944).

58. *Palko v. Connecticut*, 302 U. S. 319, 326 (1937).

59. *Chambers v. Florida*, 309 U.S. 227, 240 (1940); see *Lisenba v. California*, 314 U. S. 219, 236-7 (1941).

60. See CHAFEE, POLLAK AND STERN, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (National Commission on Law Observance and Enforcement, Report 11, 1931).

61. 8 WIGMORE, EVIDENCE § 2184 (3d ed. 1940).

62. Judge Frank in the *Fried* case called attention to Chief Justice Vinson's careful documentation of the fact that these sanctions are a dead-letter in the latter's opinion for the Court of Appeals of the District of Columbia in *Nueslein v. District of Columbia*, 115 F.2d 690, 695 (App. D. C. 1940). The failure of these sanctions has been widely observed. See CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) 518-9; Atkinson, *Admissibility of Evidence Obtained through Unreasonable Searches and Seizures*, 25 COL. L. REV. 11, 22-3 (1925). The novelty of redress for unlawful police action is underlined by the interest focussed on a damage suit currently being brought against agents of the Federal Bureau of Investigation for illegal entry and seizure. CIV. LIBERTIES Q., March 1947, p. 2, col. 4.

be the supreme Law of the Land. . . ."<sup>63</sup> For the purposes of the instant case, the differential treatment accorded confessions of varying degrees of illegality should vanish in the face of Justice Holmes' holding for the Court that "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."<sup>64</sup>

## INDISPENSABLE PARTIES UNDER THE FEDERAL RULES OF CIVIL PROCEDURE\*

Federal Rule 19 adopts the equity rules on necessary joinder of parties.<sup>1</sup> The broad requirement for necessary parties is their "joint interest,"<sup>2</sup> the determination of which has always been directed by two equity policies:<sup>3</sup> (1) A court will determine no person's rights unless he is present, and (2) complete adjudication is desirable to avoid multiplicity of suits and to arrive at a stable decree. An important qualification of these policies, particularly applicable to the federal courts<sup>4</sup> and incorporated in Rule 19(b), is that the court may proceed in an action without joining interested persons who are outside the jurisdiction or whose joinder would destroy jurisdiction, if a judgment can be rendered which will not affect their rights or liabilities.

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63. U. S. CONST. Art. VI.

64. *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 392 (1920).

\* *Calcote v. Texas Pacific Coal and Oil Co.*, 157 F.2d 216 (C. C. A. 5th 1946), *cert. denied*, 67 Sup. Ct. 205 (1946).

1. The substance of 19(a), (b) and (c) is in Equity Rules 37, 39 and 25 respectively, NOTES TO FED. R. CIV. P. 20 (1938). For full analysis and annotation of Rule 19, see 2 MOORE, FEDERAL RULES OF CIVIL PROCEDURE 2133-62 (1938) and CUM. SUPP. 29-55 (1946).

2. "(a) NECESSARY JOINER. Subject to the provisions of Rule 23 [Class Actions] and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. . . ." The first sentence in 19(b), directed to joinder of necessary parties when there is no jurisdictional obstacle, qualifies such parties as those "who ought to be parties if complete relief is to be accorded between those already parties." FED. R. CIV. P. 19.

3. CALVERT, PARTIES TO SUITS IN EQUITY 1 (1837); CLEPHANE, EQUITY PLEADING AND PRACTICE 20 (1926); 1 DANIELL, CHANCERY PRACTICE 147 (8th ed. 1914); SHIPMAN, EQUITY PLEADING 13-4 (1897); STORY, COMMENTARIES ON EQUITY PLEADINGS § 72 (10th ed. 1892).

4. This qualification was followed by the early federal courts in equity proceedings, STORY, *op. cit. supra* note 3, §§78-9; was partially enacted by Congress in 1839, 5 STAT. 321, REV. STAT. §737 (1875), now appearing in similar form in THE JUDICIAL CODE § 50, 28 U. S. C. §111 (1940); and is more broadly stated in Equity Rule 39, formerly Rule 47 (1842). See HOPKINS, THE NEW FEDERAL EQUITY RULES 103-4, 242-6 (8th ed. 1933); 2 MOORE, *op. cit. supra* note 1, at 2161-2.

Persons in this category are generally referred to as "conditionally necessary" parties. Interested persons are called "indispensable" and must be joined if the judgment will affect their rights or liabilities,<sup>5</sup> even if the consequence is dismissal of the case.<sup>6</sup>

Failure carefully to follow Rule 19(b) is illustrated by a recent Fifth Circuit case, *Calcote v. Texas Pacific Coal and Oil Co.*<sup>7</sup> Lessors brought an action against the lessee for cancellation of an oil and gas lease. Assignees of three-fourths of the lessors' one-eighth royalty interest were not joined. The lower court decreed confirmation of the lease on the ground that the lessors had ratified it *inter alia* by conveying the royalty assignments.<sup>8</sup> Although the question was raised by neither the lower court nor the litigants,<sup>9</sup> the appellate court remanded the case because the royalty assignees' interest in the lease was such that it might be injuriously affected upon either confirmation or cancellation.

Joinder of assignees on either side of the case would have ended federal jurisdiction, which was based on diversity of citizenship.<sup>10</sup> The court's posi-

5. The classic statement on equity classification of parties by the federal courts was rendered by Mr. Justice Curtis: "The court here points out three classes of parties to a bill in equity. They are: 1. Formal parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields v. Barrow*, 17 How. 130, 139 (U. S. 1854).

The classification of parties has become a confused subject in state courts mainly because of lack of uniformity in the use of nomenclature, Comment, 29 CALIF. L. REV. 731, 733 (1941); Note, 48 HARV. L. REV. 995, 996 (1935). The federal courts have largely avoided this difficulty by the use of "necessary" to mean "conditionally necessary" and by the use of "indispensable" to mean "absolutely necessary." DOBIE, *FEDERAL JURISDICTION AND PROCEDURE* 214-8 (1928); 2 MOORE, *op. cit. supra* note 1, at 2135-6; 1 STREET, *FEDERAL EQUITY PRACTICE* §510 (1909); see *Washington v. United States*, 87 F.2d 421, 427-8 (C. C. A. 9th 1936).

6. DOBIE, *op. cit. supra* note 5, at 218; 2 MOORE, *op. cit. supra* note 1, at 2160; STORRY, *op. cit. supra* note 3, §77; 1 STREET, *op. cit. supra* note 5, §§522, 533-4.

7. 157 F.2d 216 (C. C. A. 5th 1946). Judge Holmes wrote the opinion concurred in by Judge Lee. Judge Hutcheson dissented.

8. Opinion unreported. Findings of fact, conclusions of law and final decree, Transcript of Record, pp. 311-5.

9. Objection to absence of indispensable parties is not waivable and may be introduced as well by the court in any stage of the proceeding. *Hoe v. Wilson*, 9 Wall. 501 (U.S. 1869); *McConnell v. Dennis*, 153 Fed. 547 (C.C.A. 8th 1907); see 1 U. OF CHI. L. REV. 149 (1933) (state case). This is supported by FED. R. CIV. P., 21; 2 MOORE, *op. cit. supra* note 1, at 2190; 13 ROCKY MOUNT. L. REV. 76 (1940).

10. Where federal jurisdiction depends solely on diversity of citizenship, any two

tion was that, since jurisdiction depended on whether absent parties were indispensable, that question had to be answered at the outset of the case. The fact that absent parties may not have been prejudicially affected by the lower court's judgment on the merits, it was held, was not controlling.<sup>11</sup> The court therefore did not review the merits of the decision below and examined the interests of the royalty assignees as if no decree had been made.<sup>12</sup>

This emphasis on possible ouster of jurisdiction, while logical at first blush, ignores the underlying theme of Rule 19(b). The Rule in terms makes the determination of indispensable parties an exercise of a court's discretion; and the long history of the similar doctrine in equity<sup>13</sup> indicates that the controlling limitation on this discretion is whether or not, under the particular facts of each case,<sup>14</sup> absent parties will be adversely affected by non-joinder.<sup>15</sup> It has been considered well settled, moreover, that "equity will strain"<sup>16</sup> to

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parties from the same state on opposite sides would cause dismissal, 1 MOORE, *op. cit. supra* note 1, at 481-2. Lessors' citizenship was Mississippi; lessee's Texas. While the citizenship of the assignees was not a matter of record, by the time of the trial the royalty assignees included at least one Texan and one New Yorker, besides Mississippians. This appears in the royalty transfers affecting the Calcote property, as shown by the Deed Records of Franklin County, Mississippi, listed in Appendix 7 of Respondent's brief on the petition for writ of certiorari.

11. 157 F.2d at 218.

12. The dissenting opinion emphasizes that the relief obtained in the lower court has not prejudicially affected the interests of the absent parties. However, the opinion also contends that even if they were indispensable parties, the failure to join them was not reversible error. It appears that this is only a misuse of the word "indispensable," for once parties are determined indispensable rather than necessary, they must be joined or the case dismissed; *see Sneed v. Phillips Petroleum Co.*, 76 F.2d 785, 789 (C. C. A. 5th 1935) (dissenting opinion).

13. "We do not put this case upon the ground of jurisdiction, but upon a much broader ground. . . . We put it on the ground, that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court." *Mallow v. Hinde*, 12 Wheat. 193, 198 (U.S. 1827). The best case discussion of equity's approach to this subject is by Justice Story in *West v. Randall*, 29 Fed. Cas. 718, 721-7, No. 17,424 (C.C.R.I. 1820).

14. ". . . an entirely practical question dependent in each case on the facts." *Roos v. Texas Co.*, 23 F.2d 171, 172 (C. C. A. 2d 1927), *cert. denied*, 277 U.S. 587 (1928); *Niles-Bement-Pond Co. v. Iron Moulders Union Local 68*, 254 U.S. 77, 80 (1920).

15. *Waterman v. The Canal-Louisiana Bank and Trust Co.*, 215 U. S. 33, 48-9 (1909); *Payne v. Hook*, 7 Wall. 425, 431 (U. S. 1868); *The Mechanics Bank of Alexandria v. Louisa and Maria Seaton*, 1 Pet. 299, 306 (U. S. 1828); *Elmendorf v. Taylor*, 10 Wheat. 152, 165 (U. S. 1825); *Atwood v. National Bank of Lima*, 115 F.2d 861, 863 (C. C. A. 6th 1940); *Edenborn v. Wigton*, 74 F.2d 374, 376 (C. C. A. 5th 1934), *cert. denied*, 294 U. S. 719 (1935); *Hazeltine Corp. v. White*, 68 F.2d 715, 716-7 (C. C. A. 2d 1934); *Rose v. Saunders*, 69 F.2d 339, 340 (C. C. A. 9th 1934); *Roos v. Texas Co.*, 23 F.2d 171, 172 (C. C. A. 2d 1927), *cert. denied*, 277 U. S. 587 (1928); *Williams v. Crabb*, 117 Fed. 193, 202 (C. C. A. 7th 1902), *cert. denied*, 187 U. S. 645 (1902); *Norton v. United Gas Corp.*, 1 F. R. D. 155, 161 (W. D. La. 1940).

16. *Cole Silver Mining Co. v. Virginia and Gold Hill Water Co.*, 6 Fed. Cas. 72, 74, No. 2,990 (C. C. Nev. 1871); *West v. Randall*, 29 Fed. Cas. 718, 723, No. 17,424 (C. C. R. I. 1820); *see Bourdieu v. Pacific Western Oil Co.*, 299 U. S. 65, 70 (1936).

reach a decree non-prejudicial to absentees. Thus the trial judge may deny without prejudice a preliminary motion to dismiss until such time as it may appear that none of the alternative decrees consonant with the evidence could be entered without injuring interested parties.<sup>17</sup> At the end of the trial his problem is to fashion the actual decree to conform to the merits and yet work no injustice to absentees.<sup>18</sup> Even a decree which leaves the controversy open to further litigation is usually preferred to no settlement at all,<sup>19</sup> and the decree may be framed especially to protect an absent party.<sup>20</sup> Only if the judge determines at any point in the trial that no satisfactory decree can be devised does judicial discretion end; only then must the absentee be called indispensable and the suit dismissed for lack of jurisdiction.<sup>21</sup>

Not only was the appellate court's approach in the *Calcote* case seemingly out of line with the policy inherent in Rule 19(b), but there appears to have been no reason in fact for the conclusion that the royalty assignees were indispensable parties. The court reasoned simply that the assignees had a "distinguishable legal interest" in the royalties.<sup>22</sup> Even on this conceptual level it

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The policy of straining to reach a decree appears to have resulted in the dispensability of interested parties in the following suits to clear up oil and gas titles: *Spring v. Ohio Oil Co.*, 103 F.2d 560 (C. C. A. 5th 1940); *Texas Co. v. Wall*, 107 F.2d 45 (C. C. A. 7th 1939); *Seeley v. Cornell*, 74 F.2d 353 (C. C. A. 5th 1934); *Colquitt v. Roxana Petroleum Corp.*, 49 F.2d 1025 (C. C. A. 5th 1931); *Federal Gas, Oil and Coal Co. v. Cassady*, 56 F. Supp. 824 (E. D. Ky. 1943); *Ford v. Adkins*, 39 F. Supp. 472 (E. D. Ill. 1941); *Norton v. United Gas Corp.*, 1 F. R. D. 155 (W. D. La. 1940); *Charleston National Bank v. Oberreich*, 34 F. Supp. 329 (E. D. Ky. 1940); *Carter Oil Co. v. Wood*, 30 F. Supp. 875 (E. D. Ill. 1940). *But cf.* *Keegan v. Humble Oil and Refining Co.*, 155 F.2d 971 (C. C. A. 5th 1946); *Associated Oil Co. v. Miller*, 269 Fed. 16 (C. C. A. 5th 1920), *cert. denied*, 256 U. S. 697 (1921); *Vincent Oil Co. v. Gulf Refining Co.*, 195 Fed. 434 (C. C. A. 5th 1912); *South Penn Oil Co. v. Miller*, 175 Fed. 729 (C. C. A. 4th 1909); *McConnell v. Dennis*, 153 Fed. 547 (C. C. A. 8th 1907).

17. *Currier v. Currier*, 1 F. R. D. 683 (S. D. N. Y. 1941); *Stuff v. La Budde Feed and Grain Co.*, 42 F. Supp. 493 (E. D. Wis. 1941).

If the court decides that the plaintiff does not state a cause of action, no inquiry into the question of indispensable parties is necessary. *Bourdieu v. Pacific Western Oil Co.*, 299 U. S. 65 (1936). "This principle indiscriminately applied would be dangerous." 2 MOORE, *op. cit. supra* note 1, at 2146 n.11.

18. STORY, *op. cit. supra* note 3, §§77, 79.

19. *Waterman v. The Canal-Louisiana Bank and Trust Co.*, 215 U. S. 33 (1909); *Williams v. Crabb*, 117 Fed. 193 (C. C. A. 7th 1902), *cert. denied*, 187 U. S. 645 (1902); *MacBryde v. Burnett*, 41 F. Supp. 661 (D. Md. 1941); *Steingut v. National City Bank of New York*, 38 F. Supp. 451 (S. D. N. Y. 1941); *Sauer v. Newhouse*, 24 F. Supp. 911 (D. N. J. 1938).

20. *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 268 (C. C. A. 2d 1944); *Oxley v. Sweetland*, 94 F.2d 33 (C. C. A. 4th 1938); *Cole Silver Mining Co. v. Virginia and Gold Hill Water Co.*, 6 Fed. Cas. 72, No. 2,990 (C. C. Nev. 1871); *see The Mechanics Bank of Alexandria v. Louisa and Maria Seaton*, 1 Pet. 299, 305 (U. S. 1828).

21. See note 6 *supra*.

22. 157 F. 2d at 220. For the property law on oil and gas royalties, see 3 SUMMERS, OIL AND GAS §§ 571-613 (Perm. ed. 1938); GLASSMIRE, OIL AND GAS LEASES AND ROY-

may be replied that since the controversy was limited to an alleged illegality in the lease making status of the lessee,<sup>23</sup> and since the royalty deeds were executed after the lease and made expressly subject to it, the assignees had no legal interest in the case.<sup>24</sup> The critical point, however, is that the facts do not appear to substantiate prejudice to the assignees' interest from either cancellation or confirmation of the lease.<sup>25</sup>

If the lease had been cancelled, the lessors could not have decreased the assignees' interest by making a new lease, because the royalty deeds<sup>26</sup> bound the lessors to get at least a one-eighth royalty interest in any future lease. Had the lessors wished to snuff out their assignees' royalty interests, they would have had to postpone making a new lease until 1964 when the royalty grants, upon no production, would expire. Such strategy would have been impractical for the lessors; and it was definitely controverted by an allegation,<sup>27</sup> not mentioned by the court, that a new lease<sup>28</sup> had already been signed with a different lessee. Thus the interest of the assignees could not be injured by cancellation of the old lease. Moreover, the district court's decree did not cancel that lease.

Neither were their interests prejudiced by the decree of confirmation actually entered. The assignees would have received no advantages from the new lease over the old one. Although the lessors' incentive for signing the new lease was to be a bonus paid out of oil production and an increase in delay rentals until production started, the assignees were prohibited by their deeds from participating in bonuses, delay rentals or the making of new leases. Finally, the lessors, the only parties with anything to gain from reversal, not only refrained from arguing that joinder was necessary, but expressly argued on appeal that "whether this lease be good or bad will not affect the royalty owner."<sup>29</sup>

Apart from the particular provisions of the realty papers here involved,

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ALTIES (1935); Blake, *Oil Royalties: A Suggested Criterion*, 13 MISS. L.J. 307 (1941); Levy, *Oil Royalties—A Distinct Species of Property*, 11 SO. CALIF. L. REV. 319 (1938); Comment, 17 TEX. L. REV. 346 (1939).

23. The complaint alleged that the lessee corporation was not authorized to do business in Mississippi at the time the lease was signed. Transcript of the Record, pp. 4-6.

24. "We conclude that the 'interest' referred to both in Rule 19 and the decided cases is one which must be directly affected legally by the adjudication." Samuel Goldwyn, Inc. v. United Artists Corp., 113 F.2d 703, 707 (C. C. A. 3d 1940); Chidester v. Newark, 58 F. Supp. 787, 792 (D. N. J. 1945).

25. Where a voidable lease was ratified by the execution of the royalty grants, as in the instant case, the royalty assignees were not parties; see *Grissom v. Anderson*, 125 Tex. 26, 79 S.W.2d 619 (1935); *Humble Oil and Refining Co. v. Clark*, 87 S.W.2d 471 (Tex. Com. App. 1935). But see *Cummings v. Midstates Oil Corp.*, 193 Miss. 675, 9 So.2d 648 (1942). However, the question of joinder of absent parties does not appear to have been raised in these cases.

26. Transcript of the Record, pp. 120-40.

27. *Id.* at p. 7.

28. *Id.* at pp. 10-19.

29. Additional brief for Appellants, p. 11.



there is inherent in the nature of oil and gas royalty transactions a practical argument against compelling joinder of assignees. In the instant case the lessors' three assignments were further subdivided into about fourteen holdings by the time of trial.<sup>30</sup> Such subdivision is customary, especially in the speculative, pre-production period of an oil and gas lease.<sup>31</sup> If royalty assignees were generally to be held indispensable parties to suits between lessors and lessees, an unwieldy procedure would be imposed on the royalty market.<sup>32</sup>

In holding that the determination of indispensable parties in a federal diversity case was strictly jurisdictional, the court seems to have misconstrued Rule 19(b). Moreover, even granting that the issue must be decided at the outset of the case, the facts indicate that the absentees would not have been prejudiced by either possible decision. On both counts reversal for want of indispensable parties appears erroneous.

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30. As a result of nineteen transactions up to the time of the trial, no individual assignee had as large an interest as the lessors' one-fourth of one-eighth. These transactions are listed in Appendix 7 of Respondent's brief on petition for writ of certiorari.

31. GLASSMIRE, *op. cit. supra* note 22, §84.

32. *See* Gypsy Oil Co. v. Champlin, 163 Okla. 226, 227, 22 P.2d 102, 104 (1933) (concurring opinion).